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No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CARTERET SAVINGS BANK, FA,

Respondent,

v.

LOUIS G. SHUSHAN, ET AL.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 1992

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QUESTIONS PRESENTED

1. Whether a naked assertion of alleged fraudulent conduct in a first pleading is sufficient to confer personal jurisdiction over an out-of-state defendant?

2. Whether Louisiana attorneys in a commercial transaction involving Louisiana property and Louisiana law, had the requisite minimum contacts with New Jersey to subject them to suit in New Jersey?

LIST OF PARTIES

Petitioners:

Louis G. Shushan
Donald A. Meyer
Rader Jackson
Jacqueline McPherson
Mitchell W. Herzog
Shushan, Meyer, Jackson, McPherson and Herzog

Respondent:

Carteret Savings Bank, F.A.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Louis G. Shushan, Donald A. Meyer, Rader Jackson, Jacqueline McPherson, Mitchell W. Herzog and Shushan, Meyer, Jackson, McPherson and Herzog, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Third Circuit, entered in the above-entitled proceeding on January 13, 1992.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Third Circuit, dated February 12, 1992, denying rehearing has not been reported. It is reprinted in the Appendix hereto, p.1a, infra.

The opinion of the Court of Appeals for the Third Circuit, filed January 13, 1992 is reported at 954 F.2d 141 and is reprinted in the Appendix hereto, p. 3a, infra.

The letter opinion and order of the United States District Court for the District of New Jersey, decided on April 23, 1991 is not reported. It is reprinted in the Appendix hereto, p. 42a, infra.

The opinion of the Court of Appeals for the Third Circuit, decided November 19, 1990, is reported at 919 F.2d 225, (Seitz, J., dissenting), and is reprinted in the Appendix hereto, p. 57a, infra.

The opinion of the United States District Court for the District of New Jersey, decided October 10, 1989 is reported at 721 F. Supp. 705, and is reprinted in the Appendix hereto, p. 98a, infra.

JURISDICTION

On January 13, 1992 the United States Court of Appeals for the Third Circuit entered an opinion and order vacating the order of the United States District Court for the District of New Jersey which dismissed the within action for lack of in personam jurisdiction. Petitioners moved for rehearing and rehearing in banc, which motion was denied by order entered February 12, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

No constitutional provisions, treatises, statutes, ordinances or regulations are at issue for purposes of this Petition.

STATEMENT OF THE CASE

This is a malpractice action brought by a New Jersey bank against a Louisiana attorney and his firm.

Carteret Savings Bank, F.A. (hereinafter "Carteret") engaged the Louisiana law firm of Shushan, Meyer, Jackson, McPherson and Herzog as local counsel (hereinafter the "Shushan firm"), in particular Louis G. Shushan, Esq. (hereinafter "Shushan"), for the purpose of representing Carteret's interests in granting an $82,000,000 loan to build a project named Three Lakeway, located in Metairie, Louisiana.

Shushan was contacted in Louisiana in early 1984 by Joseph Tockarshewsky, an officer of Carteret. Tockarshewsky visited Shushan in New Orleans accompanied by Steven A. Cole, another officer of Carteret. Subsequently, Shushan and the Shushan firm were engaged as a local counsel in connection with the negotiations, closing documents, and execution of the Contractors Consent Agreement.

At a time when it appeared that Three Lakeway would select Algernon Blair, Inc., an Alabama corporation (hereinafter "Blair") as the project's general contractor, Tockarshewsky and Cole were notified of the Shushan firm's prior representation of Blair. (A-63)[1] Blair was then notified of the Shushan firm's representation of Carteret and advised that the firm could not represent them in the transaction.

All of the closing documents were prepared in Louisiana and a single pre-closing meeting was held on May 29, 1985 in New Jersey. (SA2-¶6) The meeting was held at the offices of Carteret and lasted for part of the day. The May 29, 1985 meeting was scheduled and orchestrated by Herbert Rinaldi of the New Jersey law firm, Carella, Byrne, Bain and Gilfillan (Carteret's New Jersey counsel in this matter), by telephone from New Jersey to

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[1]All references designated as "A" and "SA" are to the record below.

Louisiana on May 24, 1985. The five principal participants of the loan attended the meeting, and at that time many of the documents were reviewed and some finalized. The closing was thereafter held in New Orleans on June 12, 1985. The only member of the firm who communicated with Carteret with respect to this matter was Shushan.

In connection with the Three Lakeway loan, Carteret executed a Contractor's Consent Agreement with the general contractor, Blair. This document was the subject of a lawsuit in Louisiana which gave rise to the present malpractice action. This agreement provided, in the event of a default by the borrower, that:

> Lender agrees that the Contractor shall be paid for the work done by it up to the date of such default and termination of the Construction Contract by lender, including a pro rata share of its Construction fee and retainage.

At the heart of this malpractice action is Carteret's allegations that Shushan failed to divulge certain facts during the May 29, 1985

meeting in New Jersey, including that Shushan added this specific term implicating Carteret in the Contractor's Consent.

The document containing this provision was sent to Carteret's general counsel, Herbert Rinaldi; Messrs. Cole and Tockarshewsky; and Mr. Michael Casteix of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, local counsel for one of the lenders, the Prospect Company (Travelers Ins. Co.). Furthermore, Mr. Casteix and the Travelers were also aware of Shushan's prior representation of Blair.

Eventually, the borrower defaulted on the Three Lakeway loan and the Contractor's Consent Agreement and Certification between Blair and Carteret was the subject of adjudication in the Federal District Court for the State of Louisiana in an action captioned SNS Contractors, Inc. v. Algernon Blair, No. 88-1372 (E.D. La. 1988), Section "H", Magistrate Division 5, consolidated with Fishback and Moore, Inc. v. Algernon Blair, Inc., No. 88-1424

(E.D. La. 1988), Section H, Magistrate Division 5. Carteret joined Shushan and the Shushan firm in that litigation by way of Third-Party Complaint but did not pursue it. Subsequently, that Court found in favor of Blair and entered a judgment against Carteret. The judgment was appealed and denied. SNS Contractors, Inc. v. Algernon Blair Inc., No. 89-3091 (5th Cir. 1990). During the pendency of the Louisiana litigation, Carteret brought the instant suit against Shushan in the District of New Jersey.

Shushan is not admitted to practice before the Courts of New Jersey. (SA3-¶7) He and his firm have not handled any matters in New Jersey. (SA3-¶7) He and his firm do not advertise in New Jersey. (SA3-¶8) He was retained as local counsel in the course of a phone call from New Jersey to Louisiana placed by Tockarshewsky. (SA2-¶2) With the limited exception of any changes made at the May 29, 1985 New Jersey meeting, all the work in preparing the voluminous closing documents and

the Contractor's Consent took place in Louisiana. (SA2-¶3)

All documents prepared by Shushan relating to the closing of Three Lakeway were reviewed by Herbert Rinaldi of the New Jersey law firm of Carella, Byrne, Bain & Gilfilian, who also represented Carteret in this matter.

Shushan's only presence in the State of New Jersey was at the meeting held on May 29, 1985 for the purpose of reviewing closing documents. The pre-closing meeting was arranged by Mr. Rinaldi to be conducted in New Jersey.

Invoking federal jurisdiction under 28 U.S.C. §1332(a)(1), Carteret brought this instant suit in the United States District Court for the District of New Jersey. In fact, Carteret's first complaint was word-for-word identical with that filed in Louisiana. (SA-7) Shushan filed a timely motion to dismiss the complaint for lack of in personam jurisdiction. As a result of Shushan's meaningful jurisdictional challenge, Carteret cross-moved for

leave to file an amended complaint alleging an intentional tort of fraud on the part of Shushan and the Shushan firm to advance a jurisdictional argument.

Instead of an outright grant of Shushan and the Shushan firm's motion, the court invited them to move to transfer for lack of venue. This motion to transfer venue pursuant to 28 U.S.C. §1404 was filed only as an alternative to the pending motion to dismiss the complaint for lack of in personam jurisdiction. Upon further argument and consideration, Judge Politan issued an order on June 29, 1989, (i) dismissing the action for lack of personal jurisdiction over the petitioners, and (ii) transferring the matter to the District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. §1406. See p. 113a, infra. The district court reasoned that Carteret could not demonstrate that the respondents had sufficient contacts with New Jersey for personal jurisdiction and it also rejected Carteret's assertion

of an intentional tort at the sole New Jersey meeting as "factually incorrect".

Carteret moved for reconsideration, modification or certification for appeal of the June 29, 1989 order. In its opinion dated October 13, 1989, the district court denied the motions and confirmed the transfer of the action under 28 U.S.C. §1406(a). (p. 98a)

On Carteret's appeal and petition for writ of mandamus, the Third Circuit on November 19, 1990 dismissed the appeal, (Seitz, J., concurring in part, dissenting in part) for lack of appellate jurisdiction and issued a partial writ of mandamus directing Judge Politan to vacate ¶2 of the June 29th Order, to wit... "under the provision of [28 U.S.C. 1406(a)] the within matter is transferred to the United States District Court for the Eastern District of Louisiana." (p. 57a)

The Court of Appeals then conceived of only two courses the case could take in district court: (i) dismissal for lack of personal

jurisdiction; or (ii) transfer to Louisiana. (See p. 89a, infra) Shushan then moved for a rehearing en banc of the partial petition of mandamus pursuant to Fed.R.App.P. 40, based on the dissent in the opinion. This was denied on January 17, 1991.

The matter was remanded and again heard before Judge Politan. At his request, supplemental memoranda of law were submitted by both parties. After consideration of the papers submitted, Judge Politan ordered that the matter remain dismissed for lack of in personam jurisdiction. Specifically, Judge Politan vacated ¶2 of the Order dated June 29, 1989 which transferred the matter to the Eastern District of Louisiana; granted the plaintiff's motion to amend the Complaint nunc pro tunc; and ordered that the matter remain dismissed for lack of in personam jurisdiction, as their were no contacts sufficient to exercise jurisdiction over the defendants. (p. 42a)

Respondent appealed and the Third Circuit exercised appellate jurisdiction pursuant to 28 U.S.C. §1291. On January 13, 1992, the Third Circuit vacated the District Court's order dismissing the action for lack of personal jurisdiction. The Court held that since plaintiff avers that Shushan committed a fraudulent misrepresentation while attending the pre-closing meeting in New Jersey, this mere allegation is sufficient to invoke New Jersey jurisdiction. Additionally, regarding a claim of breach of a fiduciary duty, Shushan had sufficient minimum contacts with New Jersey during the course of his representation of Carteret for the exercise of specific jurisdiction. (See p. 3a, infra.)

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT'S DECISION, REVERSING THE DISTRICT COURT AND MAKING A FINDING OF PERSONAL JURISDICTION IS IN CONFLICT DIRECTLY AND IN PRINCIPLE, WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

This Petition involves a question of exceptional importance, to wit, the finding of

jurisdiction over an out-of-state attorney, solicited by a national lending institution to perform a real estate transaction in his home state, based on a random half-day meeting arranged and called for by the lending institution in New Jersey, which finding obviates all jurisdictional boundaries and flies in the face of International Shoe v. Washington, 326 U.S. 310 (1945) and its progeny.

A. The Standard To Be Applied.

In cases where the defendants have properly raised a jurisdictional defense, "the plaintiff bears the burden of demonstrating contact with the forum state sufficient to give the court in personam jurisdiction." Time Share Vacation v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1981) (quoting Compagnie Des Bauxites De Guinee v. L'Union, 723 F.2d 357, 362 (3d Cir. 1983)).

Pursuant to Fed.R.Civ.P. 4(e), a federal district court can exercise personal jurisdiction over a non-resident defendant to

the extent allowed by the court of the state where the court sits. See Provident Nat'l Bank v. Cal. Fed. Savings Loan Assoc., 819 F.2d 434, 436 (3d Cir. 1987). This is in accord with the Civil Practice Rules of New Jersey, to wit: R.4:4-4(c)(1), which permits service on non-resident defendants "to the uttermost limits permitted by the United States Constitution." Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971); Beckwith v. Bethlehem Steel Corp., 182 N.J.Super. 376, 383 (Law Div. 1981). Thus, New Jersey's long arm statute is co-extensive to due process laws of the Constitution. DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 284 (3d Cir. 1981), cert. denied, 454 U.S. 1085 (1981) (interpreting the New Jersey long arm rule); See also, Carty v. Beech Aircraft Corp., 679 F.2d 1051, 1051 (3d Cir. 1982) (when a state statute contains language providing that jurisdiction extends to the limits of the Constitution, the Third Circuit has focused on the due process requirement). As a result, the

amenability to suit of the non-resident defendants, Shushan and the Shushan firm, in the present case must be evaluated by fourteenth amendment standards. Mesalic v. Fiberfloat Corp. 897 F.2d 696 (3d Cir. 1990).

For the plaintiff to establish in personam jurisdiction over a non-resident defendant, the non-resident defendant must have some relationship with the state or its citizens. "In order to subject the defendant to a judgment in personam, when he is not present within the territory of the forum, he must have certain 'minimal contacts' with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe v. Washington, 326 U.S. 310, 316 (1945). The cases which followed this decision continue to refine this principal.

For example, in Hanson v. Denckla, 357 U.S. 235 (1958), this Court stated that "it is essential in each case that there be some act by which the defendant purposely avails himself of

the privilege of conducting his activities within the foreign state, thus invoking the benefits and protections of its law." Id. at 253 (emphasis added); Mesalic, 897 F.2d at 699. This requirement was again expressed in Burger King Corp. v. Rudzewicz 471 U.S. 462 (1986), wherein "purposeful availment" was noted as the requirement that "ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts ..." Id. at 475.

"The due process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relationship." International Shoe, 326 U.S. at 319. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," Schaffer v. Heitner, 433 U.S. 186, 218 (1977), the due process clause "gives a degree of predictability to the legal system

that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit". World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

A potential defendant may have been said to be "fairly warned" in two situations:

First, a court may permissibly exercise what has been referred to as "general jurisdiction" over any defendant who has maintained "continuous and substantial" forum affiliations, even if the plaintiff's claim does not arise out of or is unrelated to those foreign affiliations. Helicopteros Nationales de Columbia S.A. v. Hall, 466 U.S. 408 (1984).

For a court to exercise general jurisdiction, the defendant must have significantly greater "continuous and systematic" contacts with the forum state. Helicopteros Nationales de Columbia, S.A., 466 U.S. at 414. A defendant who is not doing

business in the forum does not satisfy the test of general in personam jurisdiction.

Alternatively, "specific jurisdiction" may be invoked "when a plaintiff's claim is 'related to or arises out of' the defendant's contacts with the forum. Only in the latter is minimum contacts analysis appropriate." Dollar Savings Bank v. First Security Bank of Utah, 746 F.2d 208, 212 (3d Cir. 1984). This is a more lenient standard and defines minimum contacts as those "specific" to in personam jurisdiction based on contacts related to the particular cause of action.

The contacts with the forum state must relate not only to their quantity and quality, but also to the cause of action which hales them into court. Starline Optical Corp. v. Caldwell, 598 F.Supp. 1023, 1025 (D.N.J. 1984) (citing World-Wide Volkswagen, 444 U.S. at 297).

This Court has provided instruction with respect to when potential defendants should "reasonably anticipate" being sued out-of-state.

In this respect, our courts frequently draw from the reasoning of Hanson, 357 U.S. at 253:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws (emphasis added).

Cited in Burger King Corp., 471 U.S. at 474, 475.

This "purposeful availment" requirement ensures that a defendant may not be subject to the jurisdiction solely as a result of "random", "fortuitous" or "attenuated" contacts. World-Wide Volkswagen, 444 U.S. at 299. For example, in this case, Shushan's one meeting on May 29, 1985. The contacts must be proximately caused by the actions of the defendant himself which create a 'substantial connection' with the forum state, not that of the person claiming jurisdiction over the

defendant -- in this case Carteret. Burger King Corp., 471 U.S. at 475; McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957). There is no question that Shushan and the Shushan firm are not subject to the general jurisdiction of the district court. Therefore, the appropriate standard to apply is that of specific jurisdiction.

Yet even if it is decided that a defendant purposely established minimum contacts within the forum state, these contacts should be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." International Shoe, 326 U.S. at 320. For example, but not by way of limitation, a court may evaluate (i) "the burden on the defendant", (ii) "the forum state's interest in adjudicating the dispute," (iii) "the plaintiff's interest in obtaining convenient and effective relief," (iv) "the interstate judicial systems interested in

obtaining the most efficient resolution of controversies," and (v) "shared interest of the ... states in furthering fundamental substantial social policies." World-Wide Volkswagen Corp., 444 U.S. at 292; Burger King Corp., 471 U.S. at 477.

In applying the above standards, clearly, Shushan and the Shushan firm are not subject to the jurisdiction of the District Court for the District of New Jersey.

B. Personal Jurisdiction Of An Out-Of-State Defendant Is Improper And Without Legal Authority When Based On A Naked Assertion Of Alleged Fraudulent Misrepresentation In A Pleading.

In the instant case, the Third Circuit placed great significance on Carteret's "naked assertion" of an alleged fraudulent misrepresentation while present during a half day "random" meeting in New Jersey which was arranged and programmed by Carteret. This brief meeting was the basis upon which the Third Circuit relied in finding jurisdiction over Shushan. However, aside from the merits,

reliance on this allegation overlooks two significant factors: (1) no misrepresentation could have taken place as a matter of law; and (2) the May pre-closing meeting in and of itself was "random and fortuitous" and thus there could not have been a conscious decision by Shushan to have "purposely availed" himself and his firm to New Jersey law within the meaning of our jurisprudence.

As to the first issue, the court below focused on Carteret's Amended Complaint (Count Two) wherein Carteret alleges that Shushan "failed to divulge several significant facts during the May meeting" (p. 9a, infra). The court further noted that Carteret "avers that Shushan committed a fraudulent misrepresentation in New Jersey..." (p. 18a, infra). "Carteret alleges that the content of the Contractor's Consent and Certification was not even discussed at the ... meeting ... this is the crux of Carteret's fraudulent misrepresentation claim..." (p. 20a, infra). Thus, silence by a

defendant, in a foreign jurisdiction, at a meeting randomly called, not by him, has been translated by this ruling into a jurisdictional finding.

The Third Circuit continued that "personal jurisdiction may be exercised over a non-resident defendant who, while present in the forum state, makes a deliberate misrepresentation during the course of negotiations [(which there were none here)] or other direct communications" (p. 21a, infra). In support of this proposition it relied on a Treatise of Robert C. Casad, entitled Jurisdiction in Civil Actions. Not one New Jersey case is cited in the treatise to support this proposition, and significantly, Lebel v. Everglades Marina, 115 N.J. 317 (1989) with its special jurisdictional ingredients is not mentioned. Note that the New Jersey Supreme Court in Lebel recognized that it was pushing the "outer most limit" of personal jurisdiction. Id. at 329. However, Lebel's jurisdictional

elements were far different and much stronger than the elements of the instant case.

An intentional misrepresentation or legal fraud "consists of a material representation of a presently existing or past fact, made with knowledge of its falsity, with the intention that the other party rely thereon, and he does so rely to his damage." Foont-Freedomfeld v. Electro-Protective, 126 N.J. Super. 254, 257 (App. Div. 1973), aff'd per curiam, 64 N.J. 197 (1974); see, Jewish Center of Sussex Cty. v. Whale, 86 N.J. 619, 625 (1981). The omission, or failure to discuss a particular provision in the case at bar could not be considered an intentional or fraudulent misrepresentation. It would, if anything, be an alleged breach of a fiduciary duty by an attorney to his client. This is the very essence of Carteret's original complaint and Count One of the Amended Complaint. Therefore, any intentional "misrepresentation" by Shushan would arguably have been made in Louisiana when

the Contractor's Consent provision was purportedly "slipped in at the 11th hour." Therefore, if no intentional misrepresentation could have been made as a matter of law, then the court cannot rely on this averment to establish jurisdiction. To do so would surely encourage frivolous pleading in order to secure a plaintiff's choice of forum. The Third Circuit's reminder that Fed.R.Civ.P 11 should be a deterrent to Carteret's forum shopping is of little comfort. (p. 30a, infra). Here, Rule 11 does not assist a defendant in streamlining the proceeding or being provided with efficient judicial relief since he must wait either until the completion of discovery on jurisdictional issues or the completion of trial to bring such a motion. Fed.R.Civ.P. 11.

C. A Finding Of In Personam Jurisdiction Based On Petitioners' Activities Within New Jersey Obviates All The Jurisdictional Boundaries Clearly Established By Burger King, Hanson and International Shoe

Forcefully, in Hanson v. Denckla, 357 U.S. 235 (1958), the Supreme Court stated that "it is essential in each case that there be some act by which the defendant purposely avails himself of the privilege of conducting his activities within the forum state, thus invoking the benefits and protections of its law." Id. at 253 (emphasis added) The Supreme Court in Burger King Corp. v. Rudzewicz 471 U.S. 462 (1986), described purposeful availment as that requirement which "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts ..." (emphasis supplied) Id. at 475. This is exactly what transpired in the case at bar with Shushan's half-day pre-closing, called for in New Jersey, not by him but by the Bank. (SA2-¶6). As a result,

Shushan's liberty interest is being violated by being subject to a potential judgment of a forum with which he has established "no meaningful contacts, ties or relationship." International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)(Emphasis supplied). The unilateral activity of those who claim some relationship with a non- resident defendant cannot satisfy the requirement of contact with the forum state. Burger King Corp., 471 U.S. at 474, 475; citing Hanson, 357 U.S. at 253.

Surely Carteret's "unilateral activity" by and through its general counsel in soliciting Shushan for a meeting in New Jersey is precisely what our Court had in mind. The contacts must be proximately caused by the actions of the defendant himself which create a 'substantial connection' with the forum state, not that of the person claiming jurisdiction over the defendant -- in this case Carteret. Burger King Corp., 471 U.S. at 475; McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

It is clear, and the district court so ruled, 721 F.Supp. at 707, (p. 98a, infra) that Shushan did not purposefully direct his activities at residents of the forum; rather, he directed his activities in the state of Louisiana. The Third Circuit felt that Reliance Steel Products v. Watson, Ess, Marshall and Enggas, 675 F.2d 587 (3d Cir. 1982) was not operative notwithstanding its pronouncements on "purposeful availment" which are instructive. The solicitation of Shushan by Carteret's general counsel for the New Jersey meeting was a unilateral activity which the Third Circuit overlooked. It is evidenced by Carteret's general counsel's, Mr. Herbert Rinaldi, Esq., billing statement for work performed on May 24, 1985 (5 days before the meeting at issue and 16 days after Shushan forwarded the subject document to Mr. Rinaldi), which states:

> Meeting with Cole regarding documents; further review of documents; phone calls to various participants, attorneys, and Louis Shushan to arrange meeting on 5/29/85 at CBB&G. (emphasis supplied)

Note that Carteret was a lead bank in a consortium of lenders which included The Travelers Insurance Company of Hartford, Connecticut with counsel in Dallas, Texas, and Louisiana; Ensign Bank F.A. of New York with counsel in New York, New York; Perpetual American Mortgage Company of McClean, Virginia; and Investors Savings and Loan Association of Richmond, Virginia. Thus and indeed, a random and fortuitous meeting of Carteret's choice.

Surely, Shushan's fleeting or fortuitous forum connection lacks the requisite element of intentional invocation of New Jersey's benefits sufficient to satisfy the requirements of Hanson v. Denckla and its progeny.

Even if one assumes that the Court is correct in finding the averment by Carteret of an intentional misrepresentation, and Shushan's meeting as not "fortuitous," one cannot blindly consider the allegations of fraud, raised by Carteret, as true in light of the facts of

record in this matter. Furthermore this Court should not lose focus of the service for which Shushan was engaged -- a Louisiana closing. The court below stated that the allegation of intentional misrepresentation must be accepted as true without regard to any facts before it. This is in total disregard of Reliance wherein the court considered what the plaintiff needed to win its case on the merits. A review of the methodic explanation contained in the Affidavit of Louis G. Shushan clearly shows that the subject Contractor's Consent clause, purportedly "slipped" in at the "eleventh hour," and Shushan's alleged intentional failure to disclose the clause at the May 29th meeting, is wholly without merit and only Carteret's "best shot" at keeping Shushan and his firm here in New Jersey -- the forum of its choice. Just as the object of the defendant attorney's New Jersey contacts was to perform the services exclusively in Virginia was a factor that outweighed the ultimately jurisdictional

significance of the New Jersey contacts in Washington v. Magazzu, 216 N.J. Super. 23 (App. Div. 1987), so too is Shushan's brief pre-closing meeting.

The Third Circuit's reliance on Lebel, 115 N.J. 317 (1989) is misplaced. (p. 25a, infra). The decisive distinguishing factor is that that case was based on commerce considerations, e.g. a transaction for goods as opposed to legal representation or services. The same can be said of the decision in Mesalic v. Fiberfloat Corp., 897 F.2d. 696 (3d Cir. 1990).

In Lebel, the plaintiff met a representative of the defendant retailer at a boat show in New York City to purchase a 1987 Cigarette SE-38-foot luxury racing boat to be used in New Jersey. 115 N.J. at 320. Plaintiff received and signed in New Jersey, a Sales Agreement. Id. Plaintiff hired a third party shipper to bring the boat to New Jersey. Id. Most importantly, during the period from the

plaintiff's first meeting with the representative at the New York Boat Show until the purchase of the boat, the defendant on at least 20 occasions made phone calls to New Jersey to solicit the plaintiff. Id. (As noted above, the New Jersey Supreme Court opined that it was, in that case, pushing jurisdiction to the "outermost limits." Id., at 329. Clearly, there has been no solicitation by Shushan, but rather by Carteret in Louisiana.

The Court employed, in its ruling, Gehling v. St. George School of Medicine, Ltd., 773 F.2d 539 (3d Cir. 1985), (p. 22a, infra) but that case is inapposite and was clearly decided in an "international" contacts context. Gehling involved a wrongful death action against a medical school in Grenada by the parents of a Pennsylvania student who died after running in a school sponsored race. Id. Gehling supports defendants' rather than plaintiff's position. Plaintiffs brought a wrongful death action against St. George's School of Medicine, Ltd.,

alleging, inter alia, negligence, breach of contract, fraudulent misrepresentation and intentional infliction of emotional distress. Id.

The defendants in Gehling filed a motion to dismiss the Complaint for lack of personal jurisdiction. The Third Circuit affirmed the order of dismissal but for the claims of fraudulent misrepresentation and emotional distress. Id. at 540. In determining whether minimum contacts were present, the court scrutinized the relationship between the defendant, the forum and the litigation. For example, the defendants' solicitation of students by placing advertisements in the New York Times and Wall Street Journal; a "media swing," including radio and television shows in Pennsylvania as well as other states; and a joint international program with a local Pennsylvania college. Notwithstanding these factors, the court concluded that the plaintiff failed to show a "sufficient nexus between St.

George's and Pennsylvania to subject St. George's to personal jurisdiction for claims arising from non-forum related activities." Id. at 542.

With regard to the contacts arising out of forum related activities, the court found that "we cannot say that St. George's 'purposely availed' itself of the 'privilege of acting' within Pennsylvania by mailing its letter of acceptance to the decedent," despite the various items sent to and from Pennsylvania regarding acceptance, matriculation and other admission information. Id. at 544. Thus, all claims other than fraudulent misrepresentation and intentional infliction of emotional distress were dismissed.

The latter claims supported jurisdiction, since the court found that the defendants' representative, after having traveled to Pennsylvania to deliver the body, specifically and "fraudulently misrepresented the cause of death," thereby causing emotional distress. Id.

at 544. In the instant case, at the half-day random and fortuitous meeting called by Carteret's general counsel, at Roseland, New Jersey, the record is utterly silent as to any specific or factual misrepresentation which impacted, in anyway, the Louisiana closing.[2]

Reliance on Wolpert v. North Shore University Hospital, 231 N.J. Super. 378 (App. Div. 1989) to support the argument as to how New Jersey courts would rule on the matter is also misplaced. Initially, the Appellate Division itself failed to even attempt to reconcile its decision in Wolpert with the ruling of the court in Bovino v. Brumbaugh, 221 N.J. Super. 432

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[2]This court indicated that the effects test may be used to establish in personam jurisdiction (p. 26a). However, it should be noted that the "effects test" is not without limitation. In Educ. Testing Serv. v. Katzman, 631 F.Supp. 550, 562 (D.N.J. 1986), the court endorsed the effects test but only in limited circumstances. "It is still an open question whether, after Calder v. Jones, 465 U.S. 783 (1984) due process concerns will permit the use of the effects test in every tort action," since on its face the effects test would appear to abolish the minimum contacts standard. Id. at 563.

(App. Div. 1987). Moreover, the recommendations of a foreign physician for the long-term physical treatment plan of a patient clearly entails a more continuing effect in the forum in its possible life-long effect on the patient than Shushan's half-day visit. The Third Circuit overlooked, as did Wolpert, the distinction between professional services and sale of goods which was made in Bovino:

> The case at bar does not involve a product which was deliberately or foreseeably shipped into the forum state's markets. It focuses on a service, not performed in the forum state but in a foreign state, rendered after the plaintiff voluntarily traveled to the foreign state so that he could benefit from that service which was available there only.
>
> When one seeks out services which are personal in nature, such as those rendered by attorneys, physicians, dentists, hospitals or accountants, and travels to the locality where he knows the services will actually be rendered, he must realize that the services are not directed to impact on any particular place. While it is true that the nature of such services is that if they are negligently done, their consequences will thereafter be felt wherever the client or patient may go, it would be fundamentally

> unfair to permit a suit in whatever distant jurisdiction the patient may carry the consequences of his treatment, or the client the consequences of the advice received. (emphasis supplied)
>
> * * * *
>
> Any other rule would seem to be not only fundamentally unfair, but would inflict upon the professions the obligation of traveling to defend suits brought in foreign jurisdictions, sometimes very distant jurisdictions, there brought solely because the patient or client upon his return to his own home decided to sue at home for services sought by himself abroad. (emphasis supplied)
>
> Such rule would have a chilling effect on the availability of professional services to non-residents.

Bovino, at 221 N.J. Super. 437-8, citing Gelineau v. New York University Hospital, 375 F. Supp. 661 (D.N.J. 1974).

In a word, this case is purely a Louisiana matter.

D. A Finding Of In Personam Jurisdiction Over Petitioners Is In Complete Disregard Of World-Wide Volkswagen.

The Third Circuit egregiously overlooked and disregarded the other factors

which should be considered when the assertion of personal jurisdiction would not comport with "fair play and substantial justice." International Shoe, 326 U.S. at 320. For example, but not by way of limitation, a court may evaluate (i) "the burden on the defendant", (ii) "the forum state's interest in adjudicating the dispute," (iii) "the plaintiff's interest in obtaining convenient and effective relief," (iv) "the interstate judicial systems interest in obtaining the most efficient resolution of controversies," and (v) "shared interest of the ... states in furthering fundamental substantial social policies." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Burger King Corp., 471 U.S. 477.

Insofar as the first requirement, the Court below ignored the burden on the defendant in litigating this case in New Jersey. For example the location of fifteen (15) witnesses who would be called upon to testify at deposition or trial. Certainly the assumption

can be made that the defendant would incur the appearance fee, travel expenses and perhaps other costs associated with a non-party fact witness who is outside the court's subpoena power. At least three liability witnesses required by Shushan reside in Louisiana. Only three of the fifteen hale from the New Jersey area.

Insofar as the second factor, choice of law is important in considering jurisdiction over the person. Burger King, 471 U.S. at 479-82. This is acknowledged by the Third Circuit in a cryptic reference in light of Count One of the Amended Complaint. Louisiana law would apply to Count One of the Amended Complaint.

In Magazzu, the defendant presented a compelling case that the aforementioned factors rendered the exercise of jurisdiction unreasonable over him in New Jersey. That court determined it would be burdensome on all parties if the dispute was adjudicated in New Jersey rather than in Virginia. Plaintiff's underlying

claims were against a Virginia medical doctor and a Virginia hospital for medical malpractice that allegedly occurred in Virginia. The court held that the plaintiffs must try the medical malpractice claims in their legal malpractice action as those claims would have been tried in Virginia under Virginia law. The court reasoned that it would be convenient to all parties, satisfy both states' interests in an efficient resolution of the controversy, and provide plaintiffs the most effective relief if the action were tried in Virginia, where almost all the key witnesses resided, where most vital evidence was to be found, and where Virginia law and practice could more readily be applied to measure the worth, if any, of plaintiff's underlying malpractice claims.

That court determined that even though the plaintiffs resided in New Jersey, Virginia had an attenuated interest in adjudicating the dispute over the failure of a Virginia attorney to commence an action in Virginia alleging

medical malpractice that occurred in Virginia. The fact that a non-resident lawyer's alleged malpractice affected clients who happened to live in the forum state has not been considered a dominant jurisdictional factor. Magazzu, 216 N.J. Super. at 29; Reliance Steel Product, 675 F.2d at 589. Accordingly, the matter was dismissed.

Furthermore, Carteret's Vice President stated, in response to the question: "[w]hether or not Carteret Savings Bank was a lender on a national basis as opposed to two or three states in the neighboring area," that "we [Carteret Savings Bank] had no specific [geographic] guideline." This factor was of particular importance in United States Golf Ass'n v. United States Amateur Golf Ass'n, 690 F.Supp. 317, 322 (D.N.J. 1988), wherein Judge Politan noted that the plaintiff "is not a small New Jersey oriented company, but rather is one of nationwide, if not international, significance... it would impose no burden upon

plaintiff to litigate in California as distinguished from New Jersey". (Defendants were found to have deliberately entered, advertised and promoted themselves in New Jersey by direct mail solicitation and, therefore, jurisdiction was warranted.) There is evidenced by the forum selection clause in the underlying loan agreement, wherein Carteret agreed that the governing law regarding the Contractor's Consent and Certification would be that of Louisiana.

Finally, Louisiana certainly has a paramount interest in assuring the integrity of its bar in adjudicating any professional negligence or malfeasance claims against a Louisiana attorney. Moreover, World-Wide Volkswagen clearly admonished that "the Framers also intended that states retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." 444 U.S. at 293. The power to regulate the Louisiana bar and bench is an indispensable aspect of Louisiana sovereignty

and necessarily "implie[s] a limitation on the sovereignty of all of its sister states." Id. To find otherwise would overburden our courts with boundless forum-shopping and obviate all the jurisdictional boundaries clearly established by International Shoe, World-Wide Volkswagen and Burger King. Thus, application of the above "fairness" and "reasonable" factors of Burger King would require New Jersey to decline jurisdiction over Shushan, irrespective of any finding of sufficient minimum contacts.

In sum, the defendants did not maintain the requisite minimum contacts with New Jersey to warrant personal jurisdiction over them. Further, even assuming that they had, there are other factors which make jurisdiction unreasonable. In a word, this is a Louisiana matter.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the Writ of Certiorari.

Respectfully submitted,

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DATED: May 8, 1992

(2)

91-1825

No.

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CARTERET SAVINGS BANK, FA,

Respondent,

v.

LOUIS G. SHUSHAN, ET AL.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-5376

CARTERET SAVINGS BANK

v.

LOUIS G. SHUSHAN, etc.

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and GARTH, Circuit Judges.

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/S/

Circuit Judge

Feb. 12, 1992

*Judge Garth voted only as to rehearing before the panel.

Filed January 13, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-5376

CARTERET SAVINGS BANK, F.A.

Appellant

v.

LOUIS J. SHUSHAN; DONALD A. MEYER; RADER JACKSON; JACQUELINE MCPHERSON; MITCHELL W. HERZOG; and SHUSHAN, MEYER, JACKSON, MCPHERSON and HERZOG

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 88-05178)

Argued
October 8, 1991
Before: MANSMANN, NYGAARD and GRATH,
Circuit Judges.

(Filed January 13, 1992)

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OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this appeal, we are asked to determine whether the New Jersey long-arm statute confers personal jurisdiction in New Jersey over Louisiana attorneys who acted as local counsel for the plaintiff in a Louisiana real estate transaction by virtue of the fact that the plaintiff avers that the defendants committed a fraud in New Jersey. Because the New Jersey statute is coextensive with federal due process, and exercising personal jurisdiction over one who acts tortiously while within the forum state does not deny due process, we find that the district court erred in dismissing this action. Thus we will vacate

the order of the district court and remand this matter for reinstatment of the Amended Complaint.

I

This dispute centers on the legal representation by Louisiana residents Louis Shushan and the law firm of Shushan, Meyer, Jackson, McPherson and Herzog as local counsel to the plaintiff in a 1985 real estate transaction concerning a Louisiana construction project. Because the district court granted a motion to dismiss, we state the facts as set forth in the plaintiffs Amended Complaint. Cf. Ransom v. Marrazzo, 848 F.2d 398, 401 (2d Cir. 1988).[1]

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[1]We are satisfied that courts reviewing a motion to dismiss a case for lack of in personam jurisdiction must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff. See In re Arthur Treacher's Franchisee Litigation, 92 F.R.D. 398, 409-10 (E.D. Pa. 1981); Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 192-93 & n.2 (E.D. Pa. 1974)("While we have found no case exactly on point that makes such an inference ... the case law in other 12(b) motions strongly supports our position"). Other

(continued...)

The plaintiff, Carteret Savings Bank, FA, which is a Federal Association with its principal place of business in New Jersey, Am. Compl. at ¶1, entered into a loan agreement with Three Lakeway for the construction of a multi-

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[1](...continued)
circuits have accepted this view. See e.g., Brown v. Flowers Industries, Inc., 688 F.2d 328, 332 (5th Cir. 1982); Behagen v. Amateur Basketball Ass'n of U.S.A., 744 F.2d 731, 733 (10th Cir. 1984).

New Jersey state courts have also held that a plaintiff's allegations must be taken as true for jurisdictional purposes. See e.g., Washington v. Magazzu, 216 N.J. Super. 216, 552 A.2d 1013, 1015 (1987)("We must accept these allegations as true and the claim as valid for the purposes of this appeal because the motion to dismiss was directed solely to the jurisdiction of the court, and not to the merits of the claim").

Of course, by accepting a plaintiff's facts as true when a motion to dismiss is originally made, a court is not precluded from revisiting the issue if it appears that the facts alleged to support jurisdiction are in dispute. See e.g., Marine Midland Bank v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)(if court does not conduct evidentiary hearing on motion to dismiss for lack of in personam jurisdiction, plaintiff need only plead prima facie case to survive the initial motion, but must eventually establish jurisdiction by a preponderance of the evidence); LaRosa v. Sponco Mfg., Inc., 712 F. Supp. 455, 458-59 (D.N.J. 1989)(citing Miller).

use project in Metairie, Louisiana. Am. Compl. at ¶6. As partial security on this loan, Three Lakeway assigned its rights and interests to Carteret under a "Collateral Assignment." Am. Compl. at ¶7. Algernon Blair was selected as the general contractor for this project. After construction had commenced, Three Lakeway filed for bankruptcy and ultimately Carteret was held liable to Algernon Blair, by a federal court in Louisiana, for a sum in excess of $1.4 million for work completed prior to Three Lakeway's bankruptcy filing.[2]

In the Lousiana litigation, the court held Carteret liable to Algernon Blair under the

---

[2]Carteret's liability was established in SNS Contractors v. Algernon Blair, Inc., 892 F.2d 430 (5th Cir. 1990), a case in which two of Algernon Blair's subcontractors sued Algernon Blair, which in turn impleaded Carteret. The United States District Court for the Eastern District of Louisiana ruled in favor of the subcontractors and in favor of Algernon Blair as against Carteret, awarding damages of $1,498,304. SNS Contractors v. Algernon Blair, Inc., No. 88-1372 (E.D. La. 1988)(consolidated with Fishback and Moore, Inc. v. Algernon Blair, Inc., No. 88-1424 (E.D. La. 1988)). The Court of Appeals for the Fifth Circuit affirmed.

terms of the "Contractor's Consent and Certification," 892 F.2d at 432, which was prepared by the defendants and executed by Carteret and Algernon Blair during the Three Lakeway closing in June of 1985. This agreement stated in relevant part:

> . . . in the event of any default by [Three Lakeway] under the Loan Agreement, [Carteret] agrees that [Algernon Blair] shall be paid for the work done by it up to the date of such default and termination of the construction contract by [Carteret] ....

Am. Compl. at ¶16.

It was during the pendency of the Louisana litigation, on December 5, 1988, that Carteret sued his Louisiana lawyers in the United States District Court for the District of New Jersey, alleging that Shushan and its law firm had "breached their fiduciary duty to Carteret," in several particulars.[3]

---

[3]These were enumerated as follows: (1) failing to disclose their prior representation of Algernon Blair and to obtain Carteret's consent to this conflict of interest, (2) failing to advise Carteret that this conflict (continued...)

At the heart of its various causes of action, Carteret averred that Louis J. Shushan, Esq., failed to divulge several significant facts during a meeting in May of 1985 that took place in Roseland, New Jersey, for the purpose of reviewing the closing documents of the Three Lakeway project. Carteret alleged that, at the Roseland meeting, Shushan failed to inform Carteret officers of his prior and existing representation of Algernon Blair, his unauthorized addition of the term implicating Carteret in the Contractor's Consent, and the legal effect of that unauthorized modifiation. Am. Compl. at ¶¶12, 20. It was shortly after the Roseland meeting that the closing for the Three Lakeway project took place in June of 1985 in New Orleans.

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[3](...continued)
jeopardized their representation of Carteret, (3) failing to protect Carteret's interests during negotiations with Algernon Blair, (4) failing to disclose to Carteret the unfavorable terms of the Contractor's consent document, and (5) failing to inform Carteret of the possible adverse legal consequences of that document. App. at 4-5.

After the defendants moved to dismiss the complaint for lack of personal jurisdiction, Carteret sought leave to file an Amended Complaint to add an intentional tort claim.[4] It also opposed the motion to dismiss for lack of personal jurisdiction. On May 22, 1989, at oral argument on the motion to amend the complaint, the district court suggested that the defendants move for a transfer order, which they did in June of 1989.

After oral argument on the motion to transfer, the district court ruled that it lacked personal jurisdiction over the defendants. App. at 135-37. Rather than granting the defendant's motion for a transfer under 28 U.S.C. §1404(a), the district court

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[4]This motion was granted nunc pro tunc on May 2, 1991, although the parties and the district court had previously proceeded as if Carteret's motion to amend the complaint had been granted. See Carteret Sav. Bank, F.A. v. Shushan, 721 F. Supp. 705, 707 (D.N.J. 1989)("Carteret then commenced this action. . . alleging that Shushan fraudulently . . . inserted the default provision . . .")(emphasis added).

ordered a transfer of venue under 28 U.S.C. §1406(a). App. at 139. The district court denied Carteret's motion for reconsideration and did not act upon Carteret's motion to certify the case for appeal. Carteret Sav. Bank, F.A. v. Shushan, 721 F. Supp. 705 (1989). The district court reasoned that Carteret could not demonstrate that the defendants had sufficient contacts with New Jersey for purposes of general jurisdiction, nor could Carteret make a showing of specific jurisidiction arising out of the loan transaction. 721 F. Supp. at 708. The district court also rejected, as "factually incorrect", Carteret's assertion of an intentional tort at the Roseland meeting. Reasoning that it could order transfer in the interests of justice, the district court transferred the case over Carteret's objections. App. at 137.

We consolidated Carteret's subsequent appeal from the transfer order and its petition for a writ of mandamus. In Carteret Savings

Bank, F.A. v. Shushan, 919 F.2d 225 (3d Cir. 1990) ("Carteret 1"), we dismissed the appeal for lack of appellate jurisdiction but granted partial relief on the mandamus petition, determining that a transfer of venue under Section 1406(a) could not be invoked over the objection of the plaintiff. 919 F.2d at 232. We declined, however, to "reverse" the order of issue, 919 F.2d at 233, and deleted only the transfer order to leave undisturbed the portion of the District Court's Order concerning personal jurisdiction. Id. In doing, we stated:

> We can only conceive of two courses which the case can then take in the district court. The court may dismiss the case because it has determined that it does not have in personam jurisdiction over Shushan in which event Carteret will have an adequate remedy to challenge the jurisdictional ruling by appealing from the final judgment. Alternatively, it is possible that the district court might grant Shushan's motion to transfer venue under section 1404(a) for the convenience of the parties as it has never been ruled on and thus is still pending.

Id. at 233.

Pursuant to the writ of mandamus on remand, in a letter opinion filed on May 2, 1991, the district court vacated the section 1406(a) transfer order, denied Shushan's outstanding motion for transfer under section 1404(a), and granted leave for Carteret to amend its complaint nunc pro tunc. App. at 609, 614, 612. Most importantly for this appeal, the district court denied Carteret's renewed requst to reconsider its holding on personal jurisdiction and dismissed the Amended Complaint for lack of personal jurisdiction.[5]

We exercise appellate jurisdiction over the district court's final order, pursuant to 28 U.S.C. §1291. "To the extent that the district court's conclusion relies upon the selection and application of legal precedent,

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[5]Quoting our language in Carteret I, see supra, the district court stated: "The Circuit did not contemplate, nor in my view leave open the possibility that this Court would, or legally could, reconsider its jurisdictional decision . . . . The issue of personal jurisdiction has been decided. It is the law of the case and I will not revisit it." App. at 610 (citation omitted).

our review is plenary." North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 688 (3d Cir.)(per curiam), cert. denied, ___ U.S. ___, 111 S.Ct. 133 (1990).

III

"A federal court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of the state." Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n., 819 F.2d 434, 436 (3d Cir. 1987). The New Jersey long-arm rule extends to the limits of the Fourteenth Amendment Due Process protection. New Jersey Court Rule 4:4-4(c); Charles Gendler & Co., Inc. v. Telecom Equip. Corp., 102 N.J. 460, 469, 508 A.2d 1127, 1131 (1986); Avdel Corp. v. Mecure, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 284 (3d Cir.), cert. denied, 454 U.S. 1085 (1981). We are constrained, under New Jersey's long-arm rule, only by the "traditional notions of fair play and substantial justice," inhering

in the Due Process Clause of the Constitution. See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).[6]

A.

In its Amended Complaint, Carteret alleged an additional count of wrongful, intentional misrepresentation (Count Two):

> ¶20. Shushan and the Shushan Firm acted wrongfully at the May 29, 1985 New Jersey meeting and at all other relevant times during the course of its representation of Carteret, in the following non-exclusive respects:
>
> (a) by deliberately failing to disclose to Carteret and others present that they had amended the Contractor's Consent to the benefit of Algernon Blair

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[6]We recognize that while the due process standard must be applied to each defendant, Calder v. Jones, 465 U.S. 783, 790 (1984); Rush v. Savchuk, 444 U.S. 320 (1980), this requirement poses no additional analysis here because the defendants consist of an attorney, his law partners and the law firm partnership. A partnership and each partner is held liable for the act of every other partner, executed in the usual way of carrying on the business of the partnership. See, e.g. Federal Deposit Ins. Corp. v. Graemoor Assoc., 686 F.2d 550 (7th Cir. 1982), cert. denied, 461 U.S. 927 (1983); Eppes v. Snowden, 656 F. Supp. 1267 (E.D. Ky. 1986).

and to the detriment of Carteret;

(b) by deliberately failing to secure Carteret's consent to the amendment;

(c) by intentionally failing to inform and advise Carteret of the purpose and legal consequences of the unauthorized amendment to the Contractor's Consent;

(d) by concealing from Cateret their prior communications with Algernon Blair concerning the Contractor's Consent;

(e) by intentionally failing to disclose their long-standing professional and personal relationship with Algernon Blair; and

(f) by taking deliberate action to benefit their long-standing client, Algernon Blair, to the significant detriment of Carteret.

¶21. Shushan and the Shushan Firm knew that Carteret relied on them to represent its interests and that Carteret could incur substantial liability as a result of Shushan's failure to disclose the unauthorized amendment of the Contractor's Consent and the legal effect thereof and his long-term attorney-client

> relationship with Algernon Blair.
>
> ¶22. Carteret has been substantially harmed, as set forth in paragraph 16 hereof, as a result of the wrongful, deliberate conduct of Shushan and the Shushan Firm and its reliance on the misrepresentation and intentional non-disclosures by defendants.

We will examine the issue of personal jurisdiction first in the context of this claim of "wrongful, deliberate . . . misrepresentations and intentional non-disclosures" by the defendants. For the sake of clarity, we must at the outset articulate the precise contours of the allegations that control our jurisdictional inquiry. Since we examined this case in Carteret I, the facts relevant to a determination of personal jurisdiction have changed significantly. In its original Complaint Carteret averred only a breach of fiduciary duty (Count One). In Count Two of its Amended Complaint, Carteret now alleges that during the time when Shushan was physically

present in Roseland, New Jersey to review the closing documents for the Three Lakeway project with Carteret, he deliberately and intentionally failed to advise Carteret of Shushan's relationship with Algernon Blair, the fact that Shushan had modified the Contractor's Consent by inserting the guarantee, and the legal import of that language. Am. Compl. at ¶20. By way of affidavit, Carteret's Vice President Steven Cole asserted "without hesitation that Carteret would not have agreed to the Contractor's Consent Agreement in the form executed if Shushan had informed Carteret [of the pertinent facts]." App. at 37.

On the face of its Amended Complaint, therefore, Carteret avers that Shushan committed a fraudulent misrepresentation in New Jersey at the Roseland meeting to formally review the closing documents prior to the Three Lakeway closing. The district court characterized "Carteret[s] assert[ion] that Shushan committed an intentional tort in New Jersey during the

meeting on May 29, 1985" as "factually incorrect," adding:

> The closing documents were prepared in Louisiana and it is therefore in Louisiana, if anywhere, that Shushan planned and committed his negligent or tortious acts. Shushan's alleged fraud was a paper fraud, hatched and executed in Louisiana.(1)
>
> ---
>
> (1)Moreover, it is significant to note that there is no evidence or suggestion that the allegedly fraudulent provision of the contract was specifically discussed at the meeting in New Jersey.

721 F. Supp. at 708.

Carteret contends that the district court erred by not accepting the factual allegations on the face of its Amended Complaint in the light most favorable to Carteret. We note that once the defendant raises the question of personal jurisdiction, the plaintiff bears the burden to prove, by a preponderance of the evidence, facts sufficient to establish personal jurisdiction. Time Share Vacation v. Atlantic Resorts, Ltd., 735 F.2d 61, 65 (3d Cir. 1981). See Provident Nat. Bank v. California Fed. Sav.

& Loan Ass'n., 819 F.2d 434 (3d Cir. 1987)(citing Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985), for the proposition that "the plaintiff bears the burden of establishing with reasonable particularity sufficient contacts between the defendant and the forum state to support jurisdiction").

The defendants do not controvert the existence of Shushan's contacts with New Jersey, namely the Roseland meeting and numerous telephone calls and correspondence; rather, the defendants refute Carteret's substantive allegations with respect to those contacts. Thus we are not presented with a case where we must accord a clearly erroneous standard of review to the factfinding of the district court, because this factfinding is not necessary to resolve the issue of personal jurisdiction.

As the district court noted in footnote 1, Carteret alleges that the content of the Contractor's Consent and Certification was

not even discussed at the Roseland meeting prior to the closing. This is precisely the crux of Carteret's fraudulent misrepresentation claim: Carteret relied upon the professional judgment of Shushan and his law firm to represent it with respect to the closing. Carteret also relied on Shushan to apprise Carteret of unfavorable contract language and Shushan's alleged failure to do so, when combined with the possibility of a motivating conflict of interest, allegedly created Carteret's liability which resulted in a judgment in excess of $1.4 million. Carteret's averments that Shushan traveled to New Jersey to confer with and to advise his client prior to the Three Lakeway closing and that during that meeting he deliberately failed to explicate matters which would materially affect Carteret's interests constitute an allegation that Shushan committed an intentional tort of misrepresentation or fraud.

Personal jurisdiction may be exercised over a non-resident defendant who, while present

in the forum state, makes a deliberate misrepresentation during the course of negotiations or other direct oral communications with the plaintiff. See, e.g. Robert C. Casad, Jurisdiction in Civil Actions §7.06 (2d ed. 1991)(citing cases). In Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539 (3d Cir. 1985), we had occasion to address whether an allegedly tortious act committed within the forum state would suffice for personal jurisdiction. There we held that personal jurisdiction could be execised over a foreign citizen who traveled to Pennsylvania where he fraudulently misrepresented the cause of death of the plaintiff's decedent, an act which gave rise to a claim for intentional infliction of emotional distress:

> Having traveled to Pennsylvania to return decedent's body, appellees clearly availed themselves of the "privilege of acting within" Pennsylvania. Furthermore, with respect to this claim the appellees could reasonably have anticipated being haled into court in Pennsylvania to answer for their alleged injurious misrepresentation. Finally, the

> cause of action arises from defendant's in-state activities, and the defendant's misrepresentation, which occurred and caused injury in Pennsylvania to Pennsylvania residents, has a sufficient connection to meet the fair play and substantial justice standard of International Shoe.

Id. at 544.

The highest New Jersey court to speak directly to this issue when construing its long-arm rule has taken the same view, holding constitutional the exercise of personal jurisdiction over a nonresident defendant who committed a tortious act in New Jersey. Knight v. San Jacinto Club, Inc., 96 N.J. Super. 81, 232 A.2d 462 (1967). In that personal injury action against a nonresident defendant, the defendant's sole contact with New Jersey consisted of the single visit yielding the accident. Id. at 84, 232 A.2d at 464. After recognizing that the New Jersey long-arm rule confers personal jurisdiction bounded only by the due process constraints of International Shoe, the Appellate Division of the Superior

Court defined the question as "whether the [United States Supreme Courat] will uphold jurisdiction based solely on the single tort of a nonresident defendant committed in the forum state." Id. at 87-88, 232 A.2d at 466. Noting that the Court had not yet passed upon this question, an observation which remains true, the New Jersey court reasoned that "a tortious act committed within the State constitutes a jurisdictional predicate 'consistent with due process.'" Id. at 90, 232 A.2d at 467. Although a stronger jurisdictional predicate could be made for an intentional tort, the New Jersey court reasoned that an unintentional tort would be sufficient. Id. Therefore, New Jersey would permit the exercise of personal jurisdiction over a nonresident defendant who committed a single torious act, whether negligent or intentional, within New Jersey.

The New Jersey Supreme Court has also more recently upheld the exercise of personal jurisdiction over a Florida defendant who

allegedly committed fraud in the context of a boat sale to a New Jersey resident. Lebel v. Everglades Marina, Inc., 115 N.J. 317; 558 A.2d 1252 (1989). The facts reveal that Lebel attended a boat show in New Jersey during which he discussed a boat purchase with the defendant and voiced his intention to use the boat in New Jersey; ensuing negotiations resulted in approximately 20 telephone calls to New Jersey; the sale agreement was received and signed in New Jersey; the boat was delivered to Lebel in Florida and never reached New Jersey due to an accident en route. 115 N.J. at 320; 558 A.2d at 1253.

Lebel alleged fraud in the sale. Unlike here, however, the defendant's only transactional contacts with New Jersey consisted of telephone calls and the mailing of the sales agreement to New Jersey. 115 N.J. at 326; 558 A.2d at 1256 ("Remember that in this case it is alleged that the defendant's representations via mail and telephone to New Jersey were

fraudulent"). Although the New Jersey court described them as "limited," it held that for purposes of specific or transactional jurisdiction, "the defendant purposefully directed his activities at the forum state." 115 N.J. at 327; 558 A.2d at 1257.

Given the holdings in Knight and Lebel, the exercise of personal jurisidiction over Shushan is consistent with New Jersey jurisprudence. Shushan's act of traveling to New Jersey, where he allegedly committed a fraud, suffices for the exercise of personal jurisdiction.

Moreover, the allegation that the defendants acted tortiously in New Jersey presents a stronger case for exercising personal jurisdiction over the defendants than the effects test employed in Calder v. Jones, 465 U.S. 783 (1984). Under the effects test, a court may exercise personal jurisdiction over a nonresident defendant who acts outside the forum state to cause an effect upon the plaintiff

within the forum state. For example, in Calder, personal jurisdiction was properly exercised in California over a Florida defendant who wrote an allegedly defamatory article, published in a nationally circulated magazine, about a California resident. Although both the writing and publishing of that article occurred outside of the forum state, those acts damaged the plaintiff within the forum state. That the article might harm the plaintiff, a California resident, in her home state should be sufficiently foreseeable, such that haling the defendant into court in the forum state would not violate notions of fair play and substantial justice. Calder, 465 U.S. at 789-90; see also Walpert v. North Shore University Hospital, 231 N.J. Super. 378, 555 A.2d 729 (1989)(holding that a physician "who issues a report, intending that it will be the basis for action in another state, should realize that liability can follow in the court of that state"); Johnson v. Bradbury, 233 N.J. Super. 129, 558 A.2d 61

(1989)(nonresident father's inducement to resident daughter to leave the forum state in exchange for payment of college tuition, could be found to constitute "effects" in the forum state such that the maintenance of the suit does not offend tranditional notions of fair play and substantial justice). If allegedly tortious acts committed outside the forum state and causing effects within that state can suffice for the exercise of personal jurisdition over a nonresident under the effects test, then clearly an allegedly tortious act committed within the forum state, which causes injury to a resident of that state, also conforms with due process. See also Hess v. Pawloski, 274 U.S. 352 (1927) (a nonresident who acts negligently within the forum state causing personal injury to a resident may be haled into court in the forum state). Moreover, McGee v. International Life Ins. Co., 355 U.S. 220 (1957), although premised upon an insurance contract, makes clear that a nonresident corporation may be haled into the

forum state's court, consistent with due process, based upon the issuance of one insurance policy to a resident, in that it "was delivered in [the forum state], the premiums were mailed from there and the insured was a resident of that state when he died." 355 U.S. at 223.

As did the district court, the defendants have characterized the gravamen of Carteret's Amended Complaint as a "garden variety" legal malpractice action. The defendants sugguest that Carteret has merely refined its pleading to attain personal jurisdiction and that Carteret's Amended Complaint is its third attempt to plead a cause of action against Shushan: first, Carteret filed a third party complaint against Shushan in the Louisiana litigation, claiming a breach of fiduciary duty, but failed to pursue that claim further; second, Carteret filed its original complaint in this action, which was substantively identical to the third party

complaint; and finally, Carteret amended its Complaint to include a tort claim.

We conclude that it would be premature and unwise for us to evaluate the merits of Carteret's tort claim now. Because the facts are vigorously contended, weighing the evidence will be the duty of the factfinder. Upon its face, the Amended Complaint pleads an intentional misrepresentation of material facts. Moreover, we note that Fed. R. Civ. P. 11 should adequately deter the plaintiff and its counsel from casting a malpractice action as an intentional tort action for the sole purpose of obtaining personal jurisdiction over a nonresident defenant. See, e.g. Ford Motor Co. v. Summit Motor Prod., Inc., 930 F.2d 277, 289 (3d Cir. 1991) (providing the standard to be applied to an alleged Rule 11 violation); Jones v. Pittsburh Nat'l Corp., 899 F.2d 1350, 1357 (3d Cir. 1990) (same).

B.

Carteret also alleges, in Count One, that the defendants breached their fiduciary duty to Carteret in drafting the Contractor's Consent and Certification without informing Carteret of either its legal ramifications or the defendants' relationship with Algernon Blair. Count One does not locate this breach in Roseland, New Jersey; rather, it refers to the whole of the defendants' representation with respect to the Three Lakeway project. Therefore, with respect to Count One, we must determine whether the plaintiffs have demonstrated that the defendants had sufficient minimum contacts with New Jersey. Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984).

Our initial inquiry is "whether [Count One] arises from the defendant's forum related activities or from non-forum related activities." Reliance Steel Prod. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587,

588 (3d Cir. 1982). General jurisdiction may be invoked when the claim does not "arise out of or is unrelated to the defendant's contacts with the forum." Dollar Sav. Bank v. First Security Bank of Utah, 746 F.2d 208, 211 (3d Cir. 1984). Carteret concedes that the contacts required for general jurisdiction are absent here, but presses specific jurisdiction.

"'[S]pecific jurisdiction' is invoked when the claim is related to or arises out of the defendant's contacts within the forum." Dollar Sav. Bank, 746 F.2d at 211. For specific, or transactional jurisdiction, "where the defendant has no continuing presence . . . the focus must be on minimum contacts." Id. at 212 (citing Paolino v. Channel Home Centers, 668 F.2d 721 (3d Cir. 1981)).

We are satisfied that Carteret has established that the defendants had sufficient minimum contacts with New Jersey during the course of their representation of Carteret for the exercise of specific jurisdiction. Shushan

does not dispute that throughout his representation of Carteret he telephoned and corresponded with Carteret managers in New Jersey or that he traveled to Roseland, New Jersey in May of 1985 to meet with Carteret management in preparation for the Three Lakeway closing.[7] While some minimal correspondence alone will not satisy minimum contacts, see, e.g., Gehling, 773 F.2d at 544 (mailing one letter of acceptance to forum state); Dollar Savings Bank, 746 F.2d at 213 (in a commercial transaction executed in Utah and New York, the sole fact that the loans were disbursed and repaid by wire transfer within the forum state did not satisfy minimum contacts), the averred purpose of the Roseland meeting constituted a culminating event in the context of Shushan's representation of Carteret: there Shushan had

---

[7]The defendants' affidavits in support of their motion to dismiss for lack of personal jurisdiction relate only to the merits of Carteret's claim, i.e., refutations of any misrepresentation, and the inconvenience of litigating in a New Jersey forum.

the opportunity to advise Carteret thoroughly concerning the closing documents and to obtain Cartert's approval for the final closing documents. Cf. Provident Nat'l Bank, 819 F.2d at 438 (observing, for purposes of general jurisdiction, that the nature of the defendant's contacts with the forum state "was central to the conduct of its business").

Contrary to the defendants' assertions, Reliance Steel, 675 F.2d at 587, does not control this case. In that case, a Pennsylvania resident sued a Missouri law firm in Pennsylvania in connection with its representation in a Kansas replevin action. We held that the Missouri law firm had insufficient minimum contacts with Pennsylvania, the forum state, to warrant the exercise of either specific or general jurisdiction. That law firm's sole contacts with Pennsylvania consisted of an advertisement in a national publication that is distributed in Pennsylvania, and the law firm's agreement to handle the Kansas replevin

action. In Reliance Steel, the law firm did not send a representative to Pennsylvania in connection with the nonforum related legal representation. This case now before us turns, as Gehling did, upon Shushan's purposefully availing himself of the privileges of acting within New Jersey by traveling to New Jersey as well as by communicating with clients within the forum state. See Gehling, 773 F.2d at 544.

We decline to attach significance to the defendants' allegation that Shushan did not solicit Carteret. Cf. Reliance Steel, 675 F.2d at 589 (the referral upon which the plaintiff sought to ground minimum contacts was unsolicited by the nonresident law firm). Here, unlike Reliance Steel, the "purposeful availment" necessary for due process purposes, see Hansen v. Denckla, 357 U.S. 235, 253 (1958), was met by Shushan's act of traveling to New Jersey to consult with his client. We also decline to adopt the defendants' position that personal jurisdiction should turn upon whether

Carteret invited Shushan to the Roseland, New Jersey meeting or Shushan himself initiated the meeting since the operative fact is that Shushan attended this meeting in New Jersey. Coupled with the telephone calls and letters to New Jersey, the attendance at the Roseland meeting suffices to establish the minimum contacts necessary for specific jurisdiction.

IV

Once the plaintiff has made out a prima facie case in favor of personal jurisdiction, the defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1986). In this regard, we are instructed to evaluate:

> "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several

> States in furthering fundamental substantive social policies."

Id. (quoting World Wide Volkswagen Corp. v. Woodson, 444 U.S. at 292)). In this regard, the defendants opine that Carteret has not demonstrated that New Jersey is the more appropriate forum in which to litigate. We conclude that the defendants have not met their burden of presenting a compelling case that a New Jersey forum's exercise of personal jurisdiction would be unreasonable.

The defendants did not explain what burden, other than inconvenience, will be visited upon them should they be required to litigate in New Jersey. In contending that we ought to look to "the reasonableness of litigating this case in New Jersey," Appellees' Brief at 36, the defendants misapprehend their burden to make a compelling case against the exercise of personal jurisdiction. Neither the assertion that Carteret does business throughout the United States, nor that a number of anticipated trial witnesses were not asked

whether they preferred a New Jersey forum or a Louisiana forum, satisfies the defendants' burden.

During discovery conducted pursuant to the defendants' motion to dismiss, Carteret produced affidavits and certifications from ten non-party witnesses who reside throughout the United States: six were willing to travel to New Jersey for deposition and trial, App. at 105, 108, 113, 114, 117, 121; four stated that New Jersey would be the more convenient location for them to attend depositions and trial, App. at 106, 111, 115, 123. In addition, Carteret's Vice President Steven Cole, asserted that all of Carteret's documentation concerning the Three Lakeway project was located in New Jersey. App. at 119.

New Jersey would also have a significant interest in adjudicating fraudulent misrepresentations occurring within its boundaries. This case will not involve the "trial within a trial", requiring the

application of another forum's law that proved to be the decisive factor in Washington v. Magazzu, 216 N.J. Super. 23, 552 A.2d 1013 (1987), upon which the defendants rely. In that legal malpractice action centering around local counsel's failure to commence a medical malpractice action in the nonforum state before the expiration of the nonforum's statute of limitations, the court found jurisdiction unreasonable because:

> Virginia [is] where almost all the key witnesses reside, where most of the vital evidence is to be found and where Virginia law and practice can more readily be applied to measure the worth, if any, of plaintiffs' underlying medical malpractice claims.

Id. at 29, 552 A.2d at 1016. By contrast, because the allegedly tortious conduct occurred in New Jersey, the district court would apply New Jersey law to Count Two.

This result is consistent with our recent decision in Mesalic v. Fiberfloat Corp., 897 F.2d 696 (3d Cir. 1990), where we determined that Fiberfloat, a Florida resident, would not

be unduly burdened by the expenses of litigating in New Jersey. 897 F.2d at 701. New Jersey had a valid interest in protecting its residents from damages arising out of the sale by a nonresident of a defectively manufactured product. Id. We also rejected the proposition that Florida had a more substantial interest than New Jersey, or that Fiberfloat's interest outweighed Mesalic's. Specifically, "Fiberfloat purposefully entered the State of New Jersey to carry out activities in an effort to repair Mesalic's boat. These actions are sufficient to distinguish cases where contacts were insufficient to assert personal jurisdiction." Id. at 702. Similarly, Shushan purposefully entered New Jersey in order to further his representation of Carteret with respect to the Three Lakeway closing.

V.

For the foregoing reasons, we will vacate the order of the district court that dismissed this action for lack of personal

jurisdiction and remand for reinstatement of the Amended Complaint and further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

April 23, 1991

LETTER OPINION AND ORDER
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Re: Carteret Savings Bank, F.A. v.
Louis G. Shushan, Donald Meyer,
Rader Jackson, Jacqueline McPherson,
Mitchell W. Herzog, and Shushan,
Meyer Jackson, McPherson & Herzog
Civil Action No. 88-5178

Dear Counsel:

The factual, legal and procedural background of this case has been detailed in two Opinions and will not be exhaustively repeated here. See Carteret Sav. Bank, FA v. Shushan, 919 F.2d 225 (3d Cir. 1990); Carteret Sav. Bank,

FA v. Shushan, 721 F.Supp. 705 (D.N.J. 1989). It is sufficient to note that on June 28, 1989 this Court found that it lacked jurisdiction over the defendants and transferred this case, under 28 U.S.C. § 1406(a), to the Eastern District of Louisiana. I also subsequently denied plaintiff Carteret's motion for reconsideration of that Order. On November 19, 1990 the Third Circuit Court of Appeals issued a writ of mandamus directing that this court "vacate paragraph 2 of [its] order of June 29, 1989."

At my direction, the parties then filed supplemental memoranda outlining their positions on a variety of issues including; (1) the Circuit's mandate; (2) Carteret's request that the court reconsider its prior jurisdictional finding; (3) Carteret's motion to formally amend its Complaint and; (4) Shushan's motion to transfer under 28 U.S.C. § 1404(a). I will address these issues individually.

MANDATE

The mandate of the Court of Appeals directs that I vacate paragraph 2 of the order of June 29, 1989. That paragraph transferred this matter, under 28 U.S.C. § 1408(a), to the Eastern District of Louisiana. That paragraph is hereby VACATED.

PERSONAL JURISDICTION

In its supplemental submission Carteret strenuously argues that two recent Third Circuit decisions, Mesalic v. Fiberfloat Corp., 897 F.2d 697 (3d Cir. 1990), and North Penn Gas Company v. Corning Natural Gas Corporation, 897 F.2d 687 (3d Cir. 1990), substantially changed the law of personal jurisdiction in this Circuit and that I should, therefore, reconsider my holding concerning the court's jurisdiction over defendant Shushan. The appropriate way to address this argument is to first look to the Circuit's very clear admonishment concerning the potential avenues

this case could take after remand. The Court wrote:

> We can only conceive of two courses which the case can ... take in the district court. The court may dismiss the case because it has determined that it does not have in personam jurisdiction over Shushan in which event Carteret will have an adequate remedy to challenge the jurisdictional ruling by appealing from the final judgment. Alternatively, it is possible that the district court might grant Shushan's motion to transfer venue under section 1404(a) for the convenience of the parties as it has never been ruled on and thus is still pending.

The Circuit did not contemplate, nor in my view, leave open the possibility that this Court would, or legally could, reconsider its jurisdictional decision. In fact, Carteret's supplemental submission cites no cases or other authority outlining the legal foundation for such action. The issue of personal jurisdiction has been decided. It is the law of the case and I will not revisit it. See Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 165 (3d Cir. 1982)

(discussion purpose of law of the case doctrine).

Nevertheless, I note that there are significant differences between both North Penn and Mesalic and the case at hand. In North Penn, the defendant, Corning Natural Gas, had a continuous thirty year business relationship with plaintiff, North Penn Gas. Corning not only transmitted payments to North Penn in Pennsylvania but also specifically contracted for the provision of services in Pennsylvania. Here, no such facts are present. Shushan has not continuous, systematic or even sporadic business ties with New Jersey and Carteret. Moreover, he is not even alleged to have contracted or in any other way availed himself of Carteret's services in New Jersey. The exact opposite is true. Carteret contacted him to provide services in Louisiana. It bares noting that in North Penn the Circuit reaffirmed the basic principle that "the constitutional touchstone remains whether the defendant

purposefully established 'minimum contacts' in the forum state." North Penn, 897 F.2d at 690 (citing, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1984)). That is whether the defendant himself created a substantial connection with the forum State. See McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). Nothing defendant Shushan did created such a connection.

Mesalic is distinguishable in the same way. In that case, the defendant Fiberfloat advertised in a national magazine that was distributed in New Jersey, voluntarily contracted to provided a boat to be used in New Jersey and, finally transported and repaired the subject boat in New Jersey. Again, the facts of this case are different. Shushan did not contact Carteret to provide professional services in New Jersey or advertise his availability to provide such services in New Jersey. To the contrary, Carteret unilaterally contacted him to prepare documents for a loan to

be issued in Louisiana to finance a construction project in Louisiana. Given these facts, Shushan's single trip to New Jersey can only be viewed for what it was, a single isolated contact different in scope and kind from the contracts found dispositive in Mesalic.

AMENDED COMPLAINT

On April 27, 1989, Carteret filed a motion to amend its complaint. That motion was not opposed by Shushan and was implicitly treated as granted by the parties. I now formalize that understanding the GRANT, nunc pro tunc to June 28, 1989, Carteret's motion.

1404(A)

The dispositive issue remaining before the Court is whether this case should be transferred under § 1404(a) or should be dismissed for lack of personal jurisdiction. To resolve this question the Court must briefly

address the standards governing transfer under 28 U.S.C. § 1404(a). This section provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The Supreme Court has explained that this statute is designed to prevent the waste of "time, energy and money" and to "protect litigants, witnesses and the public against unnecessary inconvenience and expense". Van Dusen v. Barrack, 376 U.S. 612, 616 (1964). There are a number of factors the Court must examine to make such assessments, including; (1) plaintiff's choice of forum; (2) ease of access to sources of proof; (3) compulsory process for unwilling witnesses and costs of obtaining attendance of unwilling witnesses; (4) enforceability of possible judgment; (5) administrative difficulties; (6) placing the burden of jury duty on those with the closest ties to the action; and (7) local interest in having localized controversies decided at home.

Hardaway Constructors v. Conesco Industries, 583 F.Supp. 617, 619 (D.N.J. 1983) (citing, Gulf Oil v. Gilbert, 330 U.S. 501 (1947)). While the "plaintiff's choice of form is a paramount consideration", Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910 (1971), this principle has "reduced value where . . . there is an absence of any significant contact by the forum state with the plaintiff or the transactions or conduct underlying the cause of action." National Surety Corporation v. Robert M. Barton Corp., 484 F.Supp. 222, 224 (W.D. Okla. 1979) (citing, Chicago Rock Island & Pacific R.R. Co. v. Igoe, 220 F.2d 299, 304 (7th Cir. 1955), cert. denied, 350 U.S. 822 (1955)).

Under the standard outlined in Gulf this case should not be transferred to Louisiana. This is true for a variety of reasons. First, Louisiana is not significantly more convenient than New Jersey for the various witnesses relevant to determine liability.

These witnesses are scattered across the country from Texas to New Jersey to Louisiana and Connecticut. Second, the documentary evidence relevant to Carteret's Complaint is easily accessible here as well as in Louisiana. It is also true that both states have a significant interest in the subject matter of this action; Louisiana in the conduct of its attorney and New Jersey in protecting domestic corporations from alleged acts of fraud. This court cannot, therefore, make the finding that the "balance of convenience of the parties is strongly in favor of the defendant..." Shutte, 431 F.2d at 25 (citing, Owatonna Manufacturing Company v. Melroe Company, 301 F.Supp. 1296, 1307 (D.Minn. 1969) (Emphasis is Original)). Plaintiff's choice of New Jersey should, therefore, be given controlling weight. Shushan's motion to transfer this matter under § 1404(a) is hereby DENIED and plaintiff's Complaint is DISMISSED for lack of personal jurisdiction.

This result illustrates the paradox to this case. I previously held, and remain convinced, that this Court does not have jurisdiction over defendant Shushan. Constitutionally this matter can not proceed in this District. However, it is also true that venue is technically correct here and that under the standards of convenience concerning transfers under § 1404(a) this case cannot be transferred to Louisiana. I previously resolved this dilemma by transferring this matter under 28 U.S.C. § 1406(a), in the interest of justice, to a district that was indisputably correct both jurisdictionally and in terms of venue. The Circuit reversed, primarily holding that it is not in the interest of justice under § 1406(a) to transfer a case where venue is correct,[1]

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[1]I also note that on December 1, 1990 President Bush signed the Federal "Judicial Improvements Act of 1990" (P.L. 101-650, 104 Stat. 5089). This law makes several important changes to the venue provision relevant in this case, 28 U.S.C. § 1391, including, eliminating the residence of the plaintiff as a venue choice in diversity cases. The act also adds as a (continued...)

over the objection of the plaintiff. Although it is possible that the interest of justice provision of § 1404(a) could be read to authorize transfer in this case, I am hesitant to hold so in lieu of the Circuit's construction of the same language in § 1406(a). As such, I am compelled to dismiss this action; a result that seems to confound common sense because if I am correct this plaintiff may never have a hearing on the merits of its Complaint. Such a result would not, however, offend the interest of justice because the result would have been the predictable outcome of the plaintiff's

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[1](...continued)
venue choice in diversity cases "a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced." Finally, it modifies 28 U.S.C. § 1391(a) to provide that venue is correct in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." Under these provisions it is doubtful, in this case, whether venue would be correct in New Jersey. The defendant is not subject to jurisdiction here nor did a substantial part of the events or omissions giving rise to the claims occur here.

voluntary litigation decisions. I thus leave Carteret to test its firm jurisdictional convictions in the Third Circuit.

SO ORDERED:

/S/
NICHOLAS H. POLITAN,
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5883

CARTERET SAVINGS BANK, F.A.,

Petitioner

v.

LOUIS G. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE MCPHERSON, MITCHELL W. HERZOG, AND SHUSHAN, MEYER, JACKSON, MCPHERSON & HERZOG,

Respondents

HONORABLE NICHOLAS H. POLITAN
United States District Judge
for the District of New Jersey,

Nominal Respondent

SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, Chief Judge, and SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and SEITZ, Circuit Judges

The petition for rehearing filed by respondents in the above captioned matter having been submitted to the judges who participated in

the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Beck, Stapleton, Hutchinson, and Scirica would grant rehearing by the court in banc.

BY THE COURT:

/S/
Circuit Judge

DATED: January 17, 1991

CARTERET SAVINGS BANK,
FA, Appellant

v.

LOUIS G. SHUSHAN, Donald A. Meyer, Rader Jackson, Jacqueline McPherson, Mitchell W. Herzog and Shusan, Meyer, Jackson, McPherson and Herzog.

CARTERET SAVINGS BANK
FA, Petitioner,

v.

Louis G. SHUSHAN, Donald A. Meyer, Rader Jackson, Jacqueline McPherson, Mitchell W. Herzog and Shusan, Meyer, Jackson, McPherson and Herzog,
Respondents.

Honorable Nicholas H. Politan, United States District Judge for the District of New Jersey, Nominal Respondent.

Nos. 89-5908, 89-5883

United States Court of Appeals,
Third Circuit.

Argued Aug. 14, 1990.
Decided Nov. 19, 1990.

Gerald A. Liloia, Anthony J. Sylvester (argued), Andrew M. Lankler, Riker, Danzig, Scherer & Hyland, Morristown, N.J., for appellant/petitioner.
Francis X. Crahay (argued), Joseph K. Cobuzio, Tompkins, McGuire & Wachenfeld, Newark, N.J., for appellees/respondents.

Before MANSMANN, GREENBERG and SEITZ, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

Plaintiff Carteret Savings Bank seeks review of the transfer of this action by the United States District Court for the District of New Jersey pursuant to 28 U.S.C. §1405(a) to the Eastern District of Louisiana. The district court transferred the case because it concluded that it did not have personal jurisdiction over the defendants. Carteret now appeals from the order of transfer and from the denial of its motion for reargument, modification or certification of the transfer order for appeal under 28 U.S.C. §1292(b). Alternatively, Carteret has filed a petition for a writ of mandamus under 28 U.S.C. §1651 asking us to direct the district court to vacate the transfer order and "reverse" the district court's jurisdictional determination. We will dismiss the appeal and partially grant the petition.

I. BACKGROUND

The circumstances leading to the current proceedings are as follows. Carteret, which has it principal place of business in Morristown, New Jersey, engaged Louis Shushan of the New Orleans law firm of Shushan, Meyer, Jackson, McPherson and Herzog to represent it by preparing documents for a loan by Carteret to Three Lakeway Center Partnership for construction of a large project in Louisiana. Under the terms of the loan, Lakeway assigned Carteret its rights and interests in its construction contract with Algernon Blair, Inc., the general contractor, as security. In one of the loan documents, a "Contractor's Consent and Certification" to the assignment, Carteret guaranteed obligations of Lakeway to Algernon Blair.

Lakeway declared bankruptcy and did not meet its obligations to Algernon Blair. In litigation in the United States District Court for the Eastern District of Louisiana Algernon

Blair obtained a judgment against Carteret for almost $1,500,000 on Carteret's guarantee.[1]

As a response to the Louisiana litigation Carteret brought the diversity action now on appeal against the Shushan firm and the individual defendants (collectively referred to as "Shushan") in the District of New Jersey.[2] The complaint alleged that Shushan breached its fiduciary duties by failing to advise Carteret that Algernon Blair had been Shushan's prior client and remained such during the negotiations relating to the Lakeway loan. Carteret charged that Shushan failed to protect Carteret's interest in the terms of the consent and certification and that if Shushan had not breached its duty Carteret would not have executed the guarantee in the form presented and

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[1]See SNS Contractors v. Algernon Blair, Inc., 892 F.2d 430 (5th Cir. 1990).

[2]We note that the last names of the individual defendants constitute the name of the Shushan firm. We infer that they are the partners or principals in that firm, though this is not alleged.

thus would not have been liable in the underlying Louisiana action to Algernon Blair. Carteret sought to recover its losses from Shushan.[3]

Undoubtedly, Shushan did much of its work on the loan in Louisiana. Thus, it filed an answer to Carteret's complaint which, in addition to denying any wrongdoing, asserted that the court lacked jurisdiction over it "by reason of insufficiency of minimal contact." Shushan then filed a motion to dismiss the complaint on that ground. At a hearing on this motion on May 22, 1989, the district court invited Shushan to move for a transfer of venue to Louisiana and thus did not rule on the motion to dismiss. While the court did not specify whether it contemplated that venue might be transferred under 28 U.S.C. §1404(a), providing

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[3]Carteret prepared an amended complaint but it was not filed and we need not describe its expended allegations. In Shushan's brief it explains that "[a]though the motion for leave to file an amended complaint was never granted, for purposes of argument it was treated as if it had."

for transfers for the convenience of parties or witnesses, or 28 U.S.C. §1406(a), authorizing transfers when venue is mislaid, it did indicate that it wanted "the essential information about forum non conveniens" and in particular mentioned the location of witnesses and documents and the situs for discovery, thereby implying that the court contemplated a transfer under the former section.

In response to the court's suggestion, though Shushan still primarily sought to have the complaint dismissed for lack of in personam jurisdiction, it filed a motion for transfer of venue. Shushan did not cite the statutory basis for the change of venue in its motion but at a hearing on the motions to dismiss and to transfer venue on June 28, 1989, Shushan said it was seeking the transfer on the grounds of forum non conveniens. During the hearing the district court indicated that it lacked in personam jurisdiction over Shushan. When Carteret then suggested that the action would be time-barred

in Louisiana, the court said that it would exercise its supervisory powers and transfer the case to the Eastern District of Louisiana under section 1406(a) which provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Thus, on June 28, 1989, the district court executed an order, entered on June 29, 1989, reciting that:

> (1) This court has no jurisdiction over the defendants in connection with the within complaint; and
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> (2) Under the provision of [28 U.S.C. §1406(a)] the within matter is transferred to the United States District Court for the Eastern District of Louisiana.[4]

Carteret promptly filed its motion for reargument. Alternatively it sought an order amending the order of June 29, 1989, to delete

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[4]Paragraph 2 of the order cited 28 U.S.C. §1046(a) but 28 U.S.C. §1406(a) was intended.

paragraph 2 providing for the change in venue and, as a second alternative, it asked for entry of an order pursuant ot 28 U.S.C. §1292(b) certifying the order of June 29, 1989, "as appropriate for immediate appeal."

The district court ruled on Carteret's motion in an opinion and order of October 10, 1989. Carteret Savings Bank v. Shushan, 721 F.Supp. 705 (D.N.J. 1989).[5] After reviewing the background of the case the court concluded that Shushan does "not have sufficient contacts with New Jersey for this court to exercise general jurisdiction" over it. Id. at 708. It then found that Carteret could not demonstrate that the court "can exercise specific jurisdiction by showing that [its] cause of action directly relates to [Shushan's] contact

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[5]In the opinion the court recited that it had "issued an Order dismissing this matter for lack of personal jurisdiction and transferring it, pursuant to 28 U.S.C.A. [§] 1406(a), to the Untied States District Court for the Eastern District of Louisiana." 721 F.supp. at 706. This was partially incorrect as the district court found that it did not have in personam jurisdiction but did not dismiss the case.

with New Jersey and that [Shushan] voluntarily and purposefully established such contacts with New Jersey." Id. Thus, the court concluded that it could not exercise jurisdiction over Shushan.

The court next dealt with Carteret's argument that it was powerless to transfer the case under section 1406(a) authorizing transfers "in the interest of justice" if the plaintiff lays venue "in the wrong division or district." Carteret asserted that section 1406(a) was not applicable as venue was proper in the District of New Jersey under 28 U.S.C. §1391(a).

The court concluded that section 1406(a) "vests this Court with sufficient power to transfer this case, whether venue is characterized as correct or incorrect under §1391(a)." 721 F.Supp. at 709. The court explained that section 1406(a) refers to transfers if a case is filed in the wrong division or district and not wrong venue and it pointed out that in Goldlawr, Inc. v. Heiman,

369 U.S. 463, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962), the Supreme Court upheld application of section 1406(a) in a case of improper venue in which the transferring court lacked personal jurisdiction over the defendants. 721 F.Supp. at 709. The district court indicated that the Supreme Court "evidenced a clear intention to avoid 'time consuming and justice defeating technicalities'" and that the Supreme Court further concluded "that under certain circumstances it would be inequitable to dismiss a lawsuit solely because the plaintiff made a miscalculation on an uncertain and 'elusive fact of the kind upon which venue provisions often turn.'" Id. The district court then noted that the Supreme Court found that the "'interest of justice' required transfer particularly when if the matter was dismissed the plaintiff would lose a substantial part of his cause of action due to the statute of limitations." Id. Ultimately the district court concluded that:

> This Court finds that the same analysis must be applied to a

> plaintiff who has made a proper calculation as to the question of venue, but who has made a reasonable miscalculation on the similarly elusive question of personal jurisdiction. Fundamental concepts of fair play and substantial justice requied this result. A litigant who has commmenced a timely action within the federal system should not be penalized with the loss of that cause of action solely because he has made a reasonable error as to the existence of personal jurisdiction.

Id. at 709-10.

It is thus clear that the district court was concerned with the possibility that a new action by Carteret in Louisiana would be barred by the statute of limitations. While the district court did not address Carteret's request for certification for appeal under 28 U.S.C. §1292(b), Carteret's brief includes the cryptic explanation that "the District Court has advised that it was denied: and in fact the district court did not certify the case under 28 U.S.C. §1292(b).

Carteret then appealed from the orders of June 29, 1989, and October 10, 1989, and filed its petition for mandamus in this court

requesting that we issue a writ directing the district court to vacate and set aside the order transferring venue and "reverse" the order of the district court that it lacked personal jurisdiction over Shushan. Shushan has moved to dismiss the appeal for want of appellate jurisdiction and opposes granting the writ of mandamus. We will dismiss the appeal but will grant the petition to the extent that we will direct the district court to vacate paragraph 2 of the order entered June 29, 1989, transferring venue.

II. APPEALABILITY

We turn first to Shushan's motion to dismiss the appeal. Shushan asserts that the appeal is premature as Carteret may pursue this case in the Eastern District of Louisiana and may appeal the order of transfer to the Court of Appeals for the Fifth Circuit at the conclusion of the district court case in Louisiana. There is merit to this argument as our general rule is that orders transferring venue are not

immediately appealable. See Nascone v. Spudnuts, Inc., 735 F.2d 763, 764 (3d Cir. 1984); McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1034 (3d Cir. 1974). Furthermore, it appears that the Court of Appeals for the Fifth Circuit will entertain an appeal from the transfer order at the end of the case in the district court. See Dubin v. United States, 380 F.2d 813 (5th Cir. 1967).[6] Accordingly, inasmuch as the matter was not certified under 28 U.S.C. §1292(b) we can exercise

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[6]Our result is not dependent on whether that court would have entertained an appeal from the transfer order. We do, however, note that in Dubin the case was transferred from the Northern District of Ohio to the Southern District of Florida in which a motion for retransfer was denied. After the plaintiff recovered a judgment, the defendant appealed advancing the "sole contention ... that transfer of the action from the Ohio District to the Florida District was in error." 380 F.2d at 814. The appeal, however, was probably from the denial of retransfer. Id. at 816. See also Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967).

appellate jurisdiction only if some reason appears for an exception to the general rule.[7]

Carteret argues that this case is distinguishable from the usual case in which venue is transferred because the transfer was predicated upon the district court's conclusion that it lacked in personam jurisdiction over Shushan. Carteret views this circumstance as supporting three somewhat different yet related theories by which appellate jurisdiction may be sustained: (1) a finding of lack of jurisdiction

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[7]In unusual circumstances an order on a transfer application can have sufficient "indicia of finality" to be appealable. Thus, in United States v. Berkowitz, 328 F.2d 358, 360 (3d Cir.), cert. denied, 379 U.S. 821, 84 S.Ct. 42, 13 L.Ed.2d 32 (1964), orders denying transfer were immediately appealable because the transferor court lacked jurisdiction over the defendant and the suit would have been time-barred in any other forum. Similarly an order transferring an action to a state court on the ground that the district court lacked subject matter jurisdiction was appealable. McLaughlin v. ARCO Polymers, Inc., 721 F.2d 426, 428 n. 1 (3d Cir. 1983). Those cases are distinguishable from the situation before us as in each the order on the transfer application effectively terminated the case in the federal courts. The order here had no such consequence as it permitted the case to go forward in Louisiana and thus saved it from being dismissed.

is final in itself; (2) the jurisdicational finding may be severed from the transfer order and, when standing alone, is final; and (3) the jurisdictional ruling is collaterally final under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The first and second theories are essentially the same as each depend on the theory that a court's ruling that it does not have personal jurisdiction is final and appealable, the second theory merely positing a method to circumvent a possible complicating factor.

We reject these contentions. We are aware of no authority to support the proposition that simply because a district court determines that it does not have in personam jurisdiction over a party its order is per se final regardless of its other provisions. Indeed, paragraph 1 of the order of June 29, 1989, though reciting that the court did not have jurisdiction over Shushan, made no disposition at all and thus was significant only as a

predicate for paragraph 2 which provided for the transfer. Accordingly, cases in which the court determines that it does not have jurisdiction over the defendant and dimisses the action are distinguishable from this case as there the cases are terminated at the district court level throughout the entire federal system. See Mesalic v. Fiberfloat Corp., 897 F.2d 696 (3d Cir. 1990).

Carteret's strongest case to support appealability, Reuber v. United States, 773 F.2d 1367 (D.C. Cir. 1985), is not consistent with our jurisprudence and is distinguishable. In Reuber a defendant, Litton Industries, obtained a dismissal of a complaint against it in the United States District Court for the District of Columbia for lack of personal jurisdiction. At the same time the district court transferred the action against the remaining defendants to the District of Maryland. The plaintiff then appealed from the order dismissing Litton to the Court of Appeals for the District of Columbia

Circuit. Litton moved to dismiss the appeal on the ground that the action was still pending in Maryland. The court denied the motion as it regarded the order dismissing Litton as final within 28 U.S.C. §1291. The court concluded that the provision of Fed. R. Civ. P. 54(b) which provides that, in the absence of a direction of the entry of a final judgment, an order "which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties" did not require that the plaintiff abide the outcome of the case in Maryland before it could appeal the dismissal of Litton.[8] Reuber's principal focus was thus on the negative proposition that Rule 54(b) was not a bar to the appeal.

The court then affirmatively indicated that the order of dismissal was final for "[w]hen a district court has disassociated

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[8]While the court did not say so it is clear that there must not have been a direction for entry of a final judgment under Rule 54(b).

itself from a case in all respects, it has made its 'final decision.' That is what occurred in this case." 773 F.2d at 1368. The problem, as we see it, is that the district court "disassociated itself" from all the defendants, including those remaining in the case after the transfer. Thus, it is not easy to understand why, if the case was appealable as to Litton the order of transfer would not have also been appealable.[9] But we certainly would not consider the mere fact that a district court "disassociated itself" from all the defendants as rendering an order final and appealable because we do not regard orders transferring venue as immediately appealable and we think that this is the consensus view. See Nascone v. Spudnuts, Inc., 735 F.2d at 764. Therefore we cannot accept the reasoning in Reuber. In any event, Reuber is distinguishable from this case because there the appeal was from an order of

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[9]There is no indication in the opinion that the plaintiff attempted to appeal from the order of transfer.

dismissal whereas here Carteret seeks to appeal from an order which did not dismiss anybody or anything.

Carteret also relies on Bradshaw v. General Motors Corp., 805 F.2d 110 (3d Cir. 1986), but the case is of even less help to it than Reuber. In Bradshaw the plaintiff brought an action in a state court charging the defendant with engaging in racial discrimination and tortious conduct against her deceased husband. The case was removed to the district court where it was dismissed. Carteret cites the case for the unremarkable proposition that it is "well-settled that a ruling of a District Court finding no personal jurisdiction over all defendants is typically appealable under 28 U.S.C. §1291."[10] Undoubtedly this is true but only if the district court dismisses the case as it did in Bradshaw.

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[10]Actually we question whether Bradshaw can be properly cited for the point but we have no need to pursue the issue.

Finally, we reject Carteret's reliance on the collateral order doctrine as a basis for appellate jurisdiction. In Nascone v. Spudnuts, Inc., 735 F.2d at 772-73, we indicated that "[O]rders granting or denying motions to transfer under 28 U.S.C. §1404(a) or 28 U.S.C. §1406(a) are not immediately appealable as collaterally final orders. It is irrelevant for these purposes whether the motion to transfer is based on a forum selection clause, the convenience of witnesses, or other factors."

We recognize, of course, that Carteret urges that the circumstance that the transfer was predicated on the jurisdictional ruling distinguishes this case from transfers for other reasons for purposes of the collateral order doctrine. But in view of Van Cauwenberghe v. Biard, 486 U.S. 517, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988), we reject this argument. There the Court indicated that an order denying a motion to dismiss for lack of personal jurisdiction is not an immediately appealable collateral order

because the defendant's "right not to be subject to a binding judgment may be effectively vindicated following final judgment...." Id. at 527, 108 S.Ct. at 1952. It is, of course, obvious that Van Cauwenberghe is distinguishable from this case as there the defendant's interest in avoiding entry of a judgment in a forum lacking jurisdiction over him was at stake and here Carteret's choice of forum is involved. But this distinction does not help Carteret, for a defendant's claim not to be subject to a judgment in a court without jurisdiction has a due process foundation and thus is qualitatively more significant that a claim of a plaintiff to litigate in one forum rather than another. The difference between the interests sought to be vindicated is significant because one of the requisites for collateral finality is that the right involved is "too important to be denied review." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276, 108 S.Ct. 1133, 1136, 99 L.Ed.2d 296 (1988). Futhermore,

plaintiffs are voluntarily in court. We therefore conclude that the collateral order doctrine is not applicable and, as we have already rejected Carteret's other proffered bases for jurisdiction, we will dismiss the appeal.

III. MANDAMUS

The petition for a writ of mandamus raises two questions concerning section 1406(a). The first is whether the section is applicable when venue is not mislaid and the second is whether the section may be invoked over the objection of a plaintiff who selected the "wrong division or district". We conclude that regardless of the scope of section 1406(a) the district court committed a clear error of law when it transferred the case over Carteret's objection and we further conclude that we should exercise our discretion to grant the writ of mandamus to direct the district court to vacate its order for transfer. We thus will explain but not resolve the first question.

The question of the meaning of seciton 1406(a) was implicated in United States v. States v. Berkowitz, 328 F.2d 358 (3d Cir.), cert. denied, 379 U.S. 821, 85 S.Ct. 42, 13 L.Ed.2d 32 (1964). There the district court concluded that a transfer could not be predicated on section 1406(a) in a case in which venue was proper but the court did not have in personam jurisdiction because the section applies only if venue is laid in the "wrong division or district." On appeal we avoided deciding what we characterized as the "novel and intricate contention" that section 1406(a) is broad enough to encompass a transfer for lack of personal jurisdiction as we remanded the matter to the district court to determine whether the requirements for a transfer under 28 U.S.C. §1404(a) had been met.

The issue left open in Berkowitz remains open in this circuit.[11] However, other

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[11]The district courts in this circuit have come to inconsistent conclusions on the question (continued...)

courts of appeal have held that transfers can be made under section 1406(a) even though venue has been correctly laid in the district court. See Porter v. Groat, 840 F.2d 255 (4th Cir. 1988); Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77 (2d Cir. 1978); Taylor v. Love, 415 F.2d 1118 (6th Cir. 1969), cert. denied, 397 U.S. 1023, 90 S.Ct. 1257, 25 L.Ed.2d 533 (1970); Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967); Dubin v. United States, 380 F.2d 813. These courts cited and relied on Goldlawr v. Heiman, 369 U.S. 463, 82 S.Ct. 913, 8 L.Ed.2d 39 discussed by the district court in this case, though in Goldlawr venue was mislaid so that that was not necessarily controlling. The fact is that, as the court acknowledged in Porter v. Groat, only

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[11](...continued)
of whether section 1406(a) authorizes a transfer when venue is proper in the transferor court. Compare Shaw v. Boyd, 658 F.Supp. 89 (E.D. Pa. 1987) and Young v. Cuddington, 470 F.Supp. 935 (M.D. Pa. 1979) (transfer granted under section 1406(a)) with Bakaj v. Levine, 733 F.Supp. 951 (E.D. Pa. 1990) and Lau v. Change, 415 F.Supp. 627, 631 n.6 (E.D. Pa. 1976) (transfer not permitted under section 1406(a) but allowed under section 1404(a)).

a broad construction of section 1404(a) can justify a transfer where venue is proper. The Porter court, while allowing a transfer though venue was not mislaid, indicated that if it was "applying the statute as a matter of first impression" it would not have done so. 840 F.2d at 257.

This case, however, arises in an unusual context. Here the plaintiff, Carteret, has resisted the transfer. It asked the district court to delete paragraph 2 of the order of June 29, 1989, providing for the transfer and thus leave standing only paragraph 1 of the order finding that the court did not have jurisdiction over the defendant, Shushan. It has adhered to that position in this court and at oral argument made it perfectly clear that it was willing to have this action dismissed in the district court for want of jurisdiction as it was prepared to run the risk of an affirmance of an order of dismissal regardless of the consequences. Accordingly,

this case differs from Porter, Corke, Taylor, Mayo Clinic, and Dubin, cited above, as in those cases it was the plaintiff who sought the transfer.[12]

This distinction is outcome determinative because the courts have repeatedly explained that the expansive reading of section 1406(a) allowing transfer when venue is proper is adopted as an equitable remedy to circumvent an obstacle to an expeditious and orderly adjudication on the merits. Porter, 840 F.2d at 257; Corke, 572 F.2d at 79-80; Taylor, 415 F.2d at 1120-21. In short, section 1406(a) is read broadly so that a plaintiff properly laying venue but unable to proceed in the tranferor court because of jurisdictional problems does not lose its day in court by reason of the running of the statute of limitations in another forum.

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[12]That was also true in the district court cases cited in footnote 19.

We know of no authority to support a conclusion that a plaintiff properly laying venue may be compelled to accept a transfer under section 1406(a) against its wishes.[13] A somewhat analogous situation arises when a complaint is dismissed for failure to state a cause of action but the plaintiff is granted leave to amend. In that situation if the plaintiff wishes it may, at its peril, refuse to amend

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[13]We are not implying that if venue is improper a plaintiff may be required to accept a transfer as opposed to a dismissal. That issue is not before us, as venue was properly laid here. The dissent points to Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953), and Gulf Research & Development Co. v. Harrison, 185 F.2d 457 (9th Cir. 1950), as cases transferred by district courts under section 1406(a) over plaintiffs' objections. But in those cases the district courts held that venue was mislaid so that the courts were acting within the precise terms of section 1406(a). Thus, the only issue raised by the petitions for mandamus was that the district court had erroneously applied the law, a conclusion very different for mandamus purposes than a determination that a court has exceeded its powers. See Bankers, 346 U.S. at 382, 74 S.Ct. at 147-48; Gulf Research, 185 F.2d at 495. Futhermore, there is no suggestion in the opinions that the plaintiffs asked the district court to dismiss the actions rather than transfer them.

even though able to do so, and thus stand on the allegations of the original complaint and appeal. See Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976). Here the case was transferred under section 1406(a) because the district court concluded that Carteret had not demonstrated that the court had personal jurisdiction over Shushan. Carteret believes that this conclusion was wrong and we cannot understand why "the interest of justice," the term used in 28 U.S.C. §1406(a), required Carteret to accept a remedy it did not want and thus lose any opportunity to appeal the jurisdiction ruling. Accordingly, we hold that the district court exceeded its authority when it compelled Carteret to accept the transfer.

We realize that it is possible that the interest of persons not controlling the litigation might be implicated in a plaintiff's decision to refuse a transfer. In such a case a court might be justified in compelling the plaintiff to accept a transfer, particularly if

a plaintiff's refusal to do so could result in the dismissal of an action that might be barred by the statute of limitations if reinstituted in another district. But here the plaintiff objecting to the transfer is a financial institution represented by retained attorneys and there are no interests at stake entitled to protection beyond those of the parties. Furthermore, Shushan did not want the case transferred by the district court as it first moved to dismiss and only filed the motion to transfer at the urging of the court. Even then its motion asked that transfer be considered only "in the event its pending Motion for dismissal of [Carteret's] complaint is not granted." We also point out that while Carteret may be waiving an important remedy, even constitutionally based procedural rights may be knowingly and intelligently waived.[14] D.H.

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[14]As we have already observed, at the oral argument in the district court Carteret indicated that its action was then time-barred in Louisiana. After hearing oral argument we (continued...)

Overmyer Co. v. Frick Co. 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972).

We are well aware, of course, that the mere fact the district court has made an error is not in itself the basis for the issuance of a writ of mandamus. In general, we may issue the writ only if a district court did not have the authority to make an order. Air-Shields, Inc. v. Fullam, 891 F.2d 63 (3d Cir. 1989). Furthermore, the decision to issue the writ is largely committed to the discretion of the issuing court and, as it is an extraordinary remedy, it should be issued only in exceptional circumstances and only if the party seeking the writ meets its burden to demonstrate that its right to the writ is clear and indisputable. Delgrosso v. Spang, 903 F.2d 234, 237 (3d Cir. 1988), "[t]he clear error should at least approach the magnitude of an unauthorized exercise of judicial power....". Finally, the

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[14](...continued)
are not certain that it adheres to that position.

party seeking the relief "must have no other adequate means to attain the desired relief." Delgrosso, 903 F.2d at 237.

We find that the prerequisites to issuance of the writ, as difficult as they are to satisfy, are present here. We hold that the district court could not transfer this case to the Eastern District of Louisiana pursuant to section 1406(a) over Carteret's objection. Thus, this is a case in which the predicate for the court's exercise of discretion was simply not established and we therefore are satisfied that the order of transfer approached the mangnitude of an unauthorized exercise of judicial power. This is a case in which mandamus is appropriate "to review a transfer motion which the district court could not properly have made...." McCreary Tire & Rubber Co. v. CEAT, 501 F.2d at 1934. Furthermore, mandamus is appropriate for if it is not issued

there is no other adequate means to avoid the transfer.[15]

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[15]The possibility that Carteret ultimately may be able to appeal from the transfer order to the Court of Appeals for the Fifth Circuit does not alter our result. See Nascone v. Spudnuts, Inc., 735 F.2d at 772-73. The dissent indicates that our opinion seems to moot the procedure approved in Gulf Research & Development Co. v. Leahy, 193 F.2d 302 (3d Cir. 1951), aff'd by an equally divided court, 344 U.S. 861, 73 S.Ct. 102, 97 L.Ed. 668 (1952), a continuation of the litigation implicated in Gulf Research & Development v. Harrison, 185 F.2d 457, described in footnote 13, supra, but we do not see why this is so. Leahy involved an action transferred to the District of Delaware from the Southern District in California on the grounds of improper venue. The plaintiffs moved in Delaware for a retransfer and when that was denied petitioned for a writ of mandamus in this court. We denied the petition because we recognized that the petitioners "will have an adequate remedy by appeal from any judgment which may be entered against them in the Delaware District Court." Id. at 304. Thus we had a alternative method to review the jurisdicational ruling and there was no reason to grant mandamus. Inasmuch as we had appellate jurisdiction it was certainly not "necessary" to issue the writ in aid of our jurisdiction. 28 U.S.C. §1651. Here the situation is different for if the matter is transferred we will lose jurisdication over it. Accordingly, if we read Leahy to be applicable here it can only be because ultimately an appeal of the transfer order can be taken to the Court of Appeals for the Fifth Circuit. That would lead to a conclusion that mandamus is never available in the transferor circuit as an appeal will be

(continued...)

Carteret asks in its petition for the writ of mandamus that we "reverse" the order of the district court on the jurisdicationasl issue. This we will not do. The effect of our writ will be to delete paragraph 2 of the order of June 29, 1989, and thus only paragraph 1 which finds that the court does not have jurisdiction will remain. We can only conceive of two courses which the case can then take in the district court. The court may dismiss the case because it has determined that it does not have in personam jurisdiction over Shushan in which event Carteret will have an adequate remedy to challenge the jurisdictional ruling by appealing from the final judgment. Alternatively, it is possible that the district court might grant Shushan's motion to transfer venue under section 1404(a) for the convenience of the parties as it has never been ruled on and thus is still pending. In that circumstance it would

---

[15](...continued)
possible at the conclusion of the proceedings in the transferee district court.

be difficult to understand how Carteret will have been aggrieved by the jurisdictional ruling as a transfer under section 1404(a) can be granted even if the court has jurisdiction over the parties.[16] In any event the criteria for the extraordinary remedy of mandamus have not been met on the jurisdictional issue.

In view of the foregoing we will dismiss the appeal docketed at No. 89-5908 and grant a writ on mandamus in No. 89-5883. The district court will be directed to vacate paragraph 2 of the order of June 2, 1989.

Each party shall bear its own costs.

SEITZ, Circuit Judge, concurring in part, dissenting in part.

I join the decision to dismiss Carteret's appeal, but I dissent from the

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[16]Our result, of course, is without prejudice to Shushan's motion under motion section 1404(a). We express no opinion on whether it would be appropriate for a court to transfer a case under that section if it determines that it does not have in personam jurisdiction over the defendant as that issue is not before us. We are only pointing out that it might happen.

majority's determination to issue a writ of mandamus.

The majority holds that the district court "exceeded its authority" by transferring this case under 28 U.S.C. §1406(a) over plaintiff's objection in the absence of jurisdiction over the defendants. As the majority states, "we cannot understand why 'the interest of justice,' ... required Carteret to accept a remedy [transfer] it did not want...." Majority Opinion, at p. 232-33.

There is nothing in the plain language of §1406(a) to which the majority may point in support of its position. The word "plaintiff" does not appear in the statute, as that statute provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Nor is there any language in §1406(a) to suggest that a district court's authority is completely

circumscribed by a plaintiff's resistance to the proposed transfer. In fact, district courts have transferred cases under §1406(a) over a plaintiff's objection. See Gulf Research & Dev. Co. v. Harrison, 185 F.2d 457, 459-60 (9th Cir. 1950); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382, 74 S.Ct. 145, 147, 98 L.Ed. 106 (1953). Although the plaintiffs in Harrison and Bankers Life disputed the transferor court's venue ruling, I see no principled distinction, for mandamus purposes, between objections to venue and personal jurisdiction.

The majority's concern that without mandamus "there is no other adequate means to avoid the transfer," Majority Opinion, at p. 233, is misdirected. What is critical is whether appellate review of the merits of our district court's jurisdictional determination will be available in the United States Court of Appeals for the Fifth Circuit. I think that the answer is that it will be. See Bankers Life, 346 U.S. AT 383, 74 S.Ct. at 148 (citing Gulf

Research & Dev. Co. v. Leahy, 193 F.2d 302 (3d Cir. 1951), aff'd by an equally divided court, 344 U.S. 861, 73 S.Ct. 102, 97 L.Ed. 668 (1952)). The majority's ruling seems to moot the procedure approved by our court in Leahy, 193 F.2d at 304; see also Harrison, 185 F.2d at 459; cf. Nascone v. Spudnuts, Inc., 735 F.2d 763, 772-73 & n. 9 (3d Cir. 1984), and leaves it to plaintiff rather than Congress to decide whether immediate review is available.

Finally, regardless of the inconvenience and hardship that transfer imposes upon plaintiff, this court should not issue the writ simply because plaintiff objects to the transfer. See Bankers Life, 346 U.S. at 383-84, 74 S.Ct. at 148-49; see also Leahy, 193 F.2d at 304-05 ("The mere fact that the petitioners will be put to the inconvenience and expense of what may prove to be a wholly abortive trial is an argument which might be addressed to Congress in support of legislation authorizing interlocutory

appeals but does not constitute ground for invoking mandamus power").

I therefore do not agree with the majority that the language of §1406(a) fails to authorize a transfer over plaintiff's objection where the district court finds no personal jurisdiction.

Petitioner asserts, alternatively that §1406(a) applies only to venue and, in consequence the district court's action was unauthorized. Although the majority does not decide whether §1406(a) covers a case where there is a finding of no personal jurisdiction, I must express my view thereon because it poses an independent issue as to the district court's authority to transfer here.

Several other courts of appeals, citing Goldlawr, Inc. v. Heiman, 369 U.S. 463, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962), have interpreted §1406(a) to permit transfers when the district court finds a absence of jurisdiction over the defendants. See Porter v.

Groat, 840 F.2d 255 (4th Cir. 1988); Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77 (2d Cir. 1978); Taylor v. Love, 415 F.2d 1118 (6th Cir. 1969), cert. denied, 397 U.S. 1023, 90 S.Ct. 1257, 25 L.Ed.2d 533 (1970); Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967); Dubin v. United States, 380 F.2d 813 (5th Cir. 1967). I find myself in agreement with the sentiments and analysis set forth in Porter:

> If we were applying the statute as a matter of first impression, we would agree that the district court correctly interpreted it [not to authorize transfer]. But §1406(a) has been read more expansively by other courts. In essence, they read "wrong division or district" to mean any impediment to a decision on the merits for some reason other than mere lack of venue.... We decided to align ourselves with those jurisdictions....

840 F.2d at 257.

The reason for my conclusion does not require futher elaboration. The district court thus possessed, in my view, statutory authority to transfer the case despite the existence of venue. I would not issue the writ.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5883

CARTERET SAVINGS BANK, F.A.,

Petitioner

v.

LOUIS G. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE MCPHERSON, MITCHELL W. HERZOG, AND SHUSHAN, MEYER, JACKSON, MCPHERSON & HERZOG,

Respondents

HONORABLE NICHOLAS H. POLITAN
United States District Judge
for the District of New Jersey,

Nominal Respondent

BEFORE: MANSMANN, GREENBERG and SEITZ,
Circuit Judges

O R D E R

Upon consideration of the Petition for Writ of Mandamus, the Respondents' Answer, the briefs of the parties and the arguments of counsel on August 14, 1990,

It is hereby ORDERED, ADJUDGED and DECREED by this Court that the prayer of

petitioner is granted to the extent specified in the opinion of this Court and the Clerk of this Court is directed to issue a writ of mandamus in accordance with the opinion.

Each party shall bear its own costs.

Judge Seitz dissents.

/S/
Circuit Judge

DATED: November 20, 1990

CARTERET SAVINGS BANK,
F.A., Plaintiff,

v.

Louis G. SHUSHAN, et al., Defendants.

Civ. A. No. 88-5178.

United States District Court,
D. New Jersey.

Oct. 10 1989.

As Amended Oct. 13, 1989.

Gerald A. Liloia, Anthony J. Sylvester, and Andrew M. Lankler, Riker, Danzig, Scherer & Hyland, Morristown, N.J. for plaintiff.

Francis X. Crahay, Charles F. Brennan, and Joseph K. Cobuzio, Tompkins, McGuire & Wachenfeld, Newark, N.J. for defendants.

OPINION AND ORDER

POLITAN, District Judge.

This matter comes before the Court on plaintiff's motion for reconsideration, modification or certification for appeal of this Court's bench opinion of June 28, 1989. On that date, the Court heard oral argument and issued an Order dismissing this matter for lack of personal jurisdiction and transferring it,

pursuant to 28 U.S.C. §1406(a), to the United States District Court for the Eastern District of Louisiana. For the reasons outlined herein, plaintiff's motion for reconsideration is DENIED.

A motion for reconsideration must set forth "the matters or controlling decisions which counsel believes the court has overlooked." General Rule 12I. Plaintiff, Carteret Savings Bank, P.A. ("Carteret") has not fulfilled this burden. Rather, they have presented a recapitulation of the cases and arguments considered by this Court before rendering its original decision.

The facts of this dispute are uncontested and clear. Carteret purposefully and without any solicitation, engaged the Louisiana law firm of Shushan, Meyer, Jackson, McPherson and Herzog to act as local counsel for Carteret in granting a loan on a Louisiana construction project known as Three Lakeway. As local counsel, the firm prepared all the

relevant documents for the loan in Louisiana. On May 29, 1985, Louis Shushan ("Shushan") came to New Jersey to meet with Carteret to review documents relevant to the loan.

The loan was finalized and a closing was held in Louisiana on June 12, 1985. In connection with the Three Lakeway loan, Carteret entered into a Contractor's Consent Agreement with the project's general contractor, Algernon Blair. This Agreement provided that in the event of any default by the Borrower, Carteret agreed to pay Blair for any work done prior to the default. The Agreement also provided that the laws of Louisiana would govern any questions related to the Consent Agreement.

The borrower subsequently defaulted and, in an action litigated in the United States District Court for the Eastern District of Louisiana, Carteret was found liable to Algernon Blair and a judgment was entered against Carteret for approximately $1.5 million dollars.

Carteret then commenced this action in New Jersey alleging that Shushan fraudulently and surreptitiously inserted the default provision in the consent agreement to benefit his longtime client Algernon Blair. Carteret relies on Shushan's trip to New Jersey, allegedly in furtherance of his fraudulent scheme, as the significant New Jersey contact allowing this Court to exercise jurisdiction over Shushan. The facts and law, however, do not support this conclusion.

This Court can exercise jurisdiction over a nonresident of the state in which the Court sits only to "the extent authorized by the laws of that state." See Provident National Bank v. California Federal Savings & Loan Association, 819 F.2d 434, 436 (3d Cir. 1987). In New Jersey, courts are permitted to exercise jurisdiction to the outer limits of due process. See New Jersey Civil Practice Rules, R. 4:4-4(c). Jurisdiction is therefore permitted to the fullest extent under the Constitution. See

Avdel Corp. v. Mecure, 58 N.J. 264, 268, 277 A.2d 207 (1971). The basic jurisdiction standard outlined by the Supreme Court in Internatioinal Shoe co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.E#d. 95 (1945), is that the exercise of personal jurisdiction comports with due process if the non-resident defendant has such contacts with the forum state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." This standard has been continually refined and clarified by the Court.

In Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984), the Court distinguished the exercise of specific jurisdiction from general jurisdiction. When a particular cause of action arises out of the defendant's activities in the forum state specific jurisdiction is appropriate. Provident Nat. Bank v. Cal. Fed. Sav. & Loan Ass'n., 819

F.2d 434, 437 (3d Cir. 1987). For a court to exercise general jurisdiction, the defendant must have significantly greater "continuous and systematic" contacts with the forum state. In such a case, the cause of action does not have to arise out of the defendant's forum related activities. The threshold for exercising general jurisdiction is, therefore, greater than the exercise of specific jurisdiction.

Modern jurisdiction analysis also focuses on a determination of whether the defendant purposefully established a substantial connection with the form state. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-475, 105 S.Ct. 2174, 2183-84, 85 L.Ed.2d 528 (1984). In Hanson v. Deckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), the Court outlined the central elements of this standard:

> [t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that

> there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

Id. 357 U.S. at 253, 78 S.Ct. at 1239.

In Burger King, the Court illustrated various factual scenarios under which jurisdiction would be proper.

> [w]here the defendant 'deliberately' has engaged in significant activities within a state, Keeton v. Hustler Magazine, Inc., supra, [465 U.S. 770] at 781 [104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984)] or has created 'continuing obligations' between himself and residents of the forum, Travelers Health Assn. v. Virginia, 339 U.S. [643] at 648, [70 S.Ct. 927, 930, 94 L.Ed. 1154 (1950)] he manifestly has availed himself of the privilege of conduting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King, 471 U.S. at 475-476, 105 S.Ct. at 2183-84.

In the case at bar, it is clear that the defendants did not have sufficient contacts with New Jersey for this Court to exercise

general jurisdiction. The defendants neither transact nor solicit business in New Jersey. This litigation concerns a loan for a construction project in Louisiana. The only New Jersey contact is a single trip taken by Louis Shushan to New Jersey in preparation for a closing in New Orleans. This Court cannot find from this single contact that Shushan purposefully availed himself of the protections of New Jersey's laws or could have reasonably expected to litigate any disputes concerning the Three Lakeway project in New Jersey.

Carteret must therefore demonstrate that this Court can exercise specific jurisdiction by showing that their cause of action directly relates to the defendants' contacts with New Jersey and that the defendants voluntarily and purposefully established such contacts with New Jersey. Carteret has made no such showing. They place great reliance on the fact that Shushan attended a meeting in New Jersey and that his allegely fraudulent scheme

had a foreseeable effect in New Jersey. Neither factor, however, establishes that Shushan purposefully established contacts in New Jersey or that Carteret's cause of action directly relates to Shushan's single New Jersey contact. Mr. Shushan attended the meeting in Roseland only because Carteret solicited his services in Louisiana. Further, it is well established that the mere foreseeability of causing injury in another state is not a sufficient basis for exercising personal jurisdiction over a defendant. See World-Wide Volkswagen Corp. v. Wooson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). Therefore the fact that Shushan's activities may have effected Carteret in New Jersey is not dispositive.

Carteret further asserts that Shushan committed an intentional tort in New Jersey during the meeting on May 29, 1985. This is factually incorrect. The closing documents were prepared in Louisiana and it is therefore in Louisiana, if anywhere, that Shushan planned and

committed his negligent or torious acts. Shushan's alleged fraud was a paper fraud, hatched and executed in Louisiana.[1]

The cases relied upon by Carteret, particularly Lebel v. Everglades Marina, 115 N.J. 317, 558 A.2d 1252 (1989), are clearly distinguishable. In Lebel, the defendant purposefully solicited the plaintiff's business in New Jersey. The Court wrote "this is not a situation in which the plaintiff unilaterally brought about the contacts." Id. 558 A.2d at 1255. That, however, is the situation in this case. Carteret contacted the Shushan firm to handle a wholly Louisiana transaction. Shushan did nothing to voluntarily initiate contacts with New Jersey. The single trip to New Jersey, given the vast number of meaningful contacts with Louisiana, is not a sufficient purposeful act for this Court to base a finding of

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[1]Moreover, it is significant to note that there is no evidence or suggestion that the allegedly fraudulent provision of the contract was specifically discussed at the meeting in New Jersey.

jurisdiction. To do so would be fundamentally unfair and a violation of the defendants' "individual liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations.'" Burger King, 471 U.S. at 471-472, 105 S.Ct. at 2181-82 (quoting International Shoe, 326 U.S. at 319, 66 S.Ct. at 159).

Carteret also argues that this Court is powerless to transfer this matter under §1406(a) because venue is proper in New Jersey pursuant to 28 U.S.C. §1391(a). This analysis rests on an incorrect narrow interpretation of §1406(a), unsupported by the clear language of the statue or the Supreme Court's expansive construction of this provision in Goldlawr, Inc. v. Heiman, 369 U.S. 463, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962). In Goldlawr, the Court upheld the application of §1406(a) in a case where venue was improper and the transferring court lacked

personal jurisdiction over the defendants. The Court wrote:

> The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years that of removing whatever obstacles may impede an expeditious, orderly adjudication of cases and controversies on their merits.

Id. at 466, 82 S.Ct. at 916.

Although the majority opinion did not specifically address the issue presented by Carteret, namely, the application of §1406(a) when venue is technically correct in the transferring district, the decision evidenced a clear intention to avoid "time consuming and justice defeating technicalities." Id. at 467, 82 S.Ct. at 916; quoting Internatio-Rotterdam, Inc. v. Thamsen, 218 F.2d 514, 517 (4th Cir. 1955). It would defeat this objective to limit §1406(a) as Carteret urges.

Moreover, the statute itself vests this Court with sufficient power to transfer this case, whether venue is characterized as

correct or incorrect under §1931(a). 28 U.S.C. §1406(a) provides:

> The District Court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

There are two operative principles in this provision that must be satisfied. First, is the action in the "wrong division or district" and secondly, will the "interest of justice" be served.

§1406(a) uses the term "wrong division or district," it does not specifically state wrong venue. This is a vital distinction becasue a district can be wrong in a variety of senses, venue being only one of them. This Court therefore holds, as the Fifth Circuit did in Dubin v. United States, 380 F.2d 813, 815 (5th Cir. 1967), the wrong division refers to any obstacle which prevents an orderly, expeditious, adjudication of a case on its merits. Lack of personal jurisdiction, in an

otherwise correct venue, is such an obstacle, thus triggering the application of the statute under the first principle.

As to the second factor, the Supreme Court recognized in Goldlawr that under certain circumstances it would be inequitable to dismiss a law suit solely because the plaintiff made a miscalculation on an uncertain and "elusive fact of the kind upon which venue provisions often turn." Id. 369 U.S. at 466, 82 S.Ct. at 915. The Court found the "interest of justice" required transfer particularly when if the matter was dismissed the plaintiff would lose a substantial part of his cause of action due to the statute of limitations. A contrary holding said the Court, would frustrate the "enlightened" congressional objective behind §1406(a).

This Court finds that the same analysis must be applied to a plaintiff who has made a proper calculation as to the question of venue, but who has made a reasonable miscalcula-

tion on the similarly elusive question of personal jurisdiction.[2] Fundamental concepts of fair play and substantial justice require this result. A litigant who has commenced a timely action within the federal system should not be penalized with the loss of that cause of action solely because he has made a reasonable error as to the existence of personal jurisdiction.[3]

For the foregoing reasons, the transfer of this action under §1406(a) is confirmed. An opposite conclusion would elevate form and technicality over substance and equity.

Plaintiff's motion for reconsideration is, therefore DENIED in its entirety.

SO ORDERED.

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[2]This result eliminates the incongruity addressed by Justice Harlan in his dissent in Goldlawr, 369 U.S. at 468, 82 S.Ct. at 916.

[3]The same result could be reached if the court transferred this matter pursuant to 28 U.S.C. §1404(a). United States v. Berkowitz, 328 F.2d 358, 361 (3d Cir. 1964), cert. denied, 379 U.S. 821, 85 S.Ct. 42, 13 L.Ed.2d 32 (1964).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CARTERET SAVINGS BANK, P.A.,	CIVIL ACTION NO. 88-5178
Plaintiff,	
v.	O R D E R
LOUIS G. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,	FILED JUNE 28, 1989 WILLIAM T. WALSH, CLERK
Defendants.	

THIS MATTER having come before this Court on motion of defendants, Louis G. Shushan, et als., and the Court having considered the submissions and arguments of counsel and for good cause shown,

IT IS this 28th day of June, 1989

ORDERED that:

1) This court has no jurisdiction over the defendants in connection with the within complaint; and

2) Under the provisions of 28 U.S.C. §1406(a) the within matter is transferred to the United States District Court for the Eastern District of Louisiana.

/S/
Nicholas H. Politan, U.S.D.J.

ENTERED ON THE DOCKET
ON 6/29/1989

(3)

No. 91-1825

Supreme Court, U.S.
FILED
JUN 10 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

CARTERET SAVINGS BANK, FA,

Respondent,

vs.

LOUIS G. SHUSHAN; DONALD A. MEYER; RADER JACKSON; JACQUELINE McPHERSON; MITCHELL W. HERZOG; and SHUSHAN, MEYER, JACKSON, McPHERSON AND HERZOG,

Petitioners.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This is not, as petitioner contends, simply "a malpractice action." (*See* Petition at 4.) It is a suit by plaintiff/respondent Carteret Savings Bank, FA ("Carteret") against its attorney, who committed a fraud in New Jersey on Carteret, its client. Carteret submits that the Third Circuit properly held that there is no denial of due process by a long-arm rule which confers personal jurisdiction in New Jersey over Louisiana attorneys who, while in New Jersey, committed a fraud upon its client, a New Jersey financial institution, who had numerous communications directed to Carteret in New Jersey and whose wrong-doing had substantial adverse effects on Carteret and the public in New Jersey.

A. Facts

Defendants/petitioners Louis G. Shushan ("Shushan") and his law partners and firm (collectively the "Shushan Firm") represented Carteret, a New Jersey corporation whose principal office is in New Jersey, in connection with the preparation, negotiation and execution of various documents related to an $82 million loan to finance the construction of a multi-use project in Metairie, Louisiana (the "Project") by Three Lakeway Center Partnership ("Three Lakeway"). Shushan negotiated and prepared the Contractor's Consent Agreement that was executed by Carteret, Three Lakeway and Algernon Blair, Inc. ("Algernon Blair"), the general contractor on the Project. (*See* First Amended Complaint, hereinafter "Carteret's Complaint," Respondent Appendix at 14a-23a.) At no time during his representation of Carteret did Shushan disclose to Carteret (i) his long-standing and on-going legal representation of Algernon Blair, or (ii) that he could not negotiate the terms of the Contractor's Consent Agreement on Carteret's behalf due to his conflict of interest. (*See* Carteret's Complaint at ¶ 12, Respondent Appendix at 26a; Affidavit of Joseph Tockarshewsky, hereinafter "Tockarshewsky

Aff." at ¶¶ 7 and 9, Respondent Appendix at 28a; Affidavit of Steven A. Cole, hereinafter "Cole Aff." at ¶¶ 7 and 8, Respondent Appendix at 17a-18a.)

To the contrary, Shushan did not protect Carteret's interests, but instead, took action to benefit his client, Algernon Blair. (*See* Carteret's Complaint at ¶ 12, Respondent Appendix at 17a-18a.) In connection with the Contractor's Consent Agreement, Shushan intentionally (i) altered, without Carteret's authorization or knowledge, a critical provision which formed the basis for a judicial finding that Carteret was liable as a guarantor to Algernon Blair for $1.5 million (*see* Carteret's Complaint at ¶ 12, Respondent Appendix at 17a-18a; Tockarshewsky Aff. at ¶ 8, Respondent Appendix at 26a; Cole Aff. at ¶ 8, Respondent Appendix at 30a-31a), (ii) failed to inform Carteret that the terms of the Contractor's Consent Agreement were grossly unfavorable to Carteret (*see* Carteret's Complaint at ¶ 12, Respondent Appendix at 17a-18a; Tockarshewsky Aff. at ¶ 8, Respondent Appendix at 26a; Cole Aff. at ¶ 6, Respondent Appendix at 30a-31a), and (iii) misrepresented to Carteret the nature of his negotiations with Algernon Blair (*see* Carteret's Complaint at ¶ 12, Respondent Appendix at 17a-18a; Tockarshewsky Aff. at ¶ 8, Respondent Appendix at 26a; Cole Aff. at ¶ 11, Respondent Appendix at 31a-32a).

Carteret's Complaint set forth, in detail, Shushan's fraudulent conduct. It alleged, *inter alia*:

> 18. On May 29, 1985, Shushan met with Carteret and Carteret's counsel *in Roseland, New Jersey, at the offices of Carteret's New Jersey counsel*, for the purpose of rendering legal advice to Carteret and reviewing and finalizing all documents relating to the Three Lakeway Construction Loan, including, but not limited to, the Contractor's

Consent. Shushan knew at that and all other relevant times that Carteret was relying upon him and his Firm to represent Carteret's best interests, without any consideration to any competing or conflicting interests of any other person or entity involved in the Three Lakeway Project.

19. *At the said May 29, 1985 meeting with Carteret* and at all other times throughout his representation of Carteret in connection with the Three Lakeway Construction Loan, *Shushan intentionally failed to disclose to Carteret (a) the fact of and details relating to his professional relationship with and prior and/or current representation of Algernon Blair, as well as his personal relationship with its senior executives; (b) the unauthorized modification he had made to the Contractor's Consent, as aforesaid; and (c) the potential legal effect and consequences to Carteret of such unauthorized modifications.*

20. *Shushan and the Shushan Firm acted wrongfully at the May 29, 1985 New Jersey meeting* and at all other relevant times during the course of its representation of Carteret, in the following non-exclusive respects:

(a) by deliberately failing to disclose to Carteret and others present that they had amended the Contractor's Consent to the benefit of Algernon Blair and to the detriment of Carteret;

(b) by deliberately failing to secure Carteret's consent to the amendment;

> (c) by intentionally failing to inform and advise Carteret of the purpose and legal consequences of the unauthorized amendment to the Contractor's Consent;
>
> (d) by concealing from Carteret their prior communications with Algernon Blair concerning the Contractor's Consent;
>
> (e) by intentionally failing to disclose their long-standing professional and personal relationship with Algernon Blair; and
>
> (f) by taking deliberate actions to benefit their long-standing client, Algernon Blair, to the significant detriment of Carteret.

(*See* Carteret's Complaint, Respondent Appendix at 20a-21a (emphasis added).) The allegations were fully supported by affidavits of Carteret officers who attended the meeting in New Jersey. (*See* Respondent Appendix at 24a-32a.)

Further, the record established that there were numerous written communications from Shushan to Carteret in New Jersey. (*See* Cole Aff. at ¶ 9, Respondent Appendix at 31a.) Shushan carried out his fraudulent scheme through such correspondence. The record also established that Shushan telephoned Carteret in New Jersey on numerous occasions in order to discuss details of the loan, *including the Contractor's Consent Agreement*. (*See* Cole Aff. at ¶¶ 9-10, Respondent Appendix at 31a.) These communications by Shushan to Carteret in New Jersey — even without the New Jersey meeting where the fraud was consummated — warrant the exercise of jurisdiction in New Jersey over petitioners.

B. Procedural History

On December 5, 1988, after being found liable to Shushan's other client, Algernon Blair, pursuant to the Contractor's Consent Agreement, Carteret filed its initial Complaint in this action. (*See* Respondent Appendix at 1a-7a.) On January 24, 1989, defendants filed their Answer. (*See* Answer, Respondent Appendix at 8a-13a.) By notice dated March 12, 1989, defendants moved to dismiss the complaint for lack of personal jurisdiction. Carteret opposed the motion. On May 22, 1989, the U.S. District Court for the District of New Jersey ("District Court"), *sua sponte,* instructed defendants to file a motion to transfer the action to the Eastern District of Louisiana. By notice dated June 5, 1989, defendants filed a motion to transfer the suit under 28 U.S.C. § 1404(a). In opposition to defendants' § 1404(a) motion, Carteret filed affidavits of (i) Steven A. Cole, Carteret's loan officer on the Project, and (ii) ten non-party witnesses located in, among other places, Texas, Connecticut, Louisiana, Virginia and Washington, D.C., all of whom stated that they were willing to travel to New Jersey for deposition and trial or that New Jersey was a more convenient venue for them. Further, Carteret filed a certification that attached all of the documents in Shushan's files relating to the subject loan; these documents were produced in discovery and were already located in New Jersey.

On June 28, 1989, the District Court heard argument on the motions and ruled that it did not have personal jurisdiction over defendants. The District Court did not address the § 1404(a) motion. However, the District Court, again *sua sponte,* transferred the action to the Eastern District of Louisiana, pursuant to 28 U.S.C. § 1406(a). By notice dated July 10, 1989, Carteret moved for reargument or, alternatively, to vacate the transfer order. By Opinion and Order dated October 10, 1989 and as amended on October 12, 1989, the District Court denied Carteret's motion. *Carteret Sav. Bank v. Shushan,* 721 F. Supp. 705 (D.N.J. 1989).

Carteret filed an appeal and a petition for writ of mandamus to direct the District Court to vacate the transfer order. The U.S. Court of Appeals for the Third Circuit ("Third Circuit") ordered that the petition for mandamus be referred to a merits panel and consolidated with the appeal. By notice dated January 2, 1990, Shushan moved to dismiss the appeal for lack of jurisdiction, which Carteret opposed. The Third Circuit subsequently ruled as follows: (1) The Court did not have jurisdiction to decide the appeal of the personal jurisdiction ruling; and (2) a partial writ of mandamus would issue requiring the District Court to vacate the § 1406(a) transfer. *Carteret Sav. Bank, FA v. Shushan,* 919 F.2d 225 (3d Cir. 1990). Shushan sought rehearing or rehearing *in banc,* which was denied by Order dated January 17, 1991.

Thereafter, by Opinion and Order filed on May 2, 1991, the District Court vacated the § 1406(a) transfer. Further, *inter alia,* the District Court (1) denied Shushan's motion to transfer pursuant to § 1404(a), and (2) dismissed the suit for lack of personal jurisdiction.

Carteret filed an appeal with the Third Circuit. In an opinion filed on January 13, 1992, the Third Circuit held that the District Court erred in dismissing Carteret's suit, asserting that New Jersey's exercise of personal jurisdiction "over one who acts tortiously while within the forum state does not deny due process." *Carteret Sav. Bank, FA v. Shushan,* 954 F.2d 141, 142 (3d Cir. 1992). Shushan sought rehearing, which was denied by Order dated February 12, 1992. (*See* Petitioner Appendix at 1a.) On May 11, 1992, Shushan filed the instant petition for a writ of certiorari.

C. Petitioners' Misstatements of Fact and Law

Shushan makes several misstatements of fact and law in the petition to this Court. The most egregious misstatements are (1) Shushan's recitation of the "questions presented" to this Court

by the Third Circuit ruling, and (2) the characterization of the meeting that Shushan attended in New Jersey, wherein he committed a fraud against Carteret, as "random."

Shushan identifies one of the questions presented herein to be "whether a naked assertion of alleged fraudulent conduct in a first pleading is sufficient to confer jurisdiction over an out-of-state defendant." Shushan's argument improperly intertwines Carteret's substantive claim with the jurisdictional issue. Carteret's allegations regarding Shushan's fraudulent conduct must be accepted as true for the purpose of deciding Shushan's motion to dismiss; Carteret is not required to prove its case at this stage of the proceedings.

All that is required of Carteret in the face of a motion to dismiss for lack of personal jurisdiction is the production of facts establishing Shushan's contacts with the forum state. This requirement was satisfied by the submission of detailed affidavits regarding Shushan's fraud during the meeting in New Jersey and the various other substantial contacts with New Jersey that Shushan had during the course of his representation of Carteret.

Moreover, the record below clearly reflects that Carteret has done more than "nakedly assert" fraudulent conduct. As the Third Circuit observed, Carteret filed with the District Court sworn affidavits, which fully support the allegations of Carteret's Complaint respecting Shushan's fraudulent conduct.

Furthermore, Shushan's depiction of the New Jersey meeting as a "random" chance meeting is erroneous. Shushan concedes that he came to New Jersey to meet with his client, Carteret, for the purpose of reviewing the draft loan documents relating to the $82 million loan to Three Lakeway. Thus, Shushan's characterization of the meeting as "random" is not supported by the facts in the record.

Shushan's petition contains additional misstatements of fact. Shushan refers to the action below as a malpractice suit; however, Carteret alleges a breach of fiduciary duty (Count One) and unlawful, deliberate misrepresentations and intentional nondisclosures, *i.e.*, fraudulent misrepresentation (Count Two). Shushan contends that the trial in New Jersey would be a hardship on potential witnesses; this assertion ignores the ten affidavits and certifications from potential witnesses that were filed by Carteret with the District Court and which were referred to by the Third Circuit, wherein six witnesses stated they were willing to travel to New Jersey for deposition and trial and four stated New Jersey would be the more convenient location for them. (*See* Petitioner Appendix at 38a.) Finally, Shushan urges that the forum selection clause in the Contractor's Consent Agreement is evidence supporting Louisiana jurisdiction over this matter. However, because Shushan was not a party to such agreement, the forum selection clause is irrelevant to this action.

Shushan's petition also contains misstatements with regard to the procedural history of this matter. First, Carteret did not join Shushan and the Shushan Firm in the prior litigation in which the judgment on the guarantee was entered against Carteret. Second, the District Court did not dismiss this action on June 29, 1989; it found that it could not exercise personal jurisdiction over the defendants and transferred the suit to the Eastern District of Louisiana. Finally, when the District Court ruled in 1991 that the action should be dismissed for lack of personal jurisdiction, the District Court also denied Shushan's motion to transfer the action pursuant to § 1404(a).

Among the misstatements of law made in Shushan's petition are two significant misstatements which are frequently repeated. First, Shushan asserts that he could not have committed an act of fraudulent misrepresentation at the May 29, 1985 meeting in New Jersey with Carteret because he made no specific

representations with regard to the newly-inserted clause in the Contractor's Consent Agreement that conferred a benefit to his other client, Algernon Blair. As the Third Circuit properly noted, "This is precisely the crux of Carteret's fraudulent misrepresentation claim: Carteret relied upon the professional judgment of Shushan and his law firm to represent it with respect to the closing. Carteret also relied upon Shushan to apprise Carteret of unfavorable contract language and Shushan's failure to do so, where combined with the possibility of a motivating conflict of interest, allegedly created Carteret's liability which resulted in a judgment in excess of $1.4 million." (*See* Petitioner Appendix at 20a-21a.) Under New Jersey law, a party with a fiduciary duty to another party has committed a fraud whether it flows from a fraudulent misrepresentation *or a fraudulent omission.*

Second, Shushan repeatedly argues that any fraud committed would have been committed in Louisiana, and thus jurisdiction could not lie in New Jersey. This argument ignores the holding of *Calder v. Jones,* 465 U.S. 783 (1984). Under *Calder,* in actions involving intentional torts (such as the one at bar), personal jurisdiction is proper in jurisdictions where the "effects" of the intentional tort are felt. The effects of Shushan's intentional tort of fraud were borne by Carteret in New Jersey. Hence, personal jurisdiction would be proper in New Jersey under *Calder* even if Shushan had not committed a fraud in New Jersey.

Additionally, the petition misconstrues the holdings of a number of cases. For example, petitioners seek to support their argument with the case of *United States Golf Ass'n v. United States Amateur Golf Ass'n,* 690 F. Supp. 317 (D.N.J. 1988). That court, however, found that the defendant's contacts gave rise to jurisdiction in New Jersey but transferred the matter to another forum. Petitioners also seek refuge in various lower New Jersey court decisions discussing challenges to jurisdiction. However,

those cases rejected jurisdiction either because the wrong-doing or the parties had no requisite connection to New Jersey or because, in one instance, jurisdiction would not comport with the dictates of "fair play and substantial justice." As observed by the Third Circuit and *supra*, this clearly is not so in the case at bar.

Also, petitioners misstate a crucial aspect of the Third Circuit's ruling. Whereas petitioners assert that Louisiana law would govern this action, the Third Circuit ruled that New Jersey law would apply to the fraud claim (Count Two of Carteret's Complaint).

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE FAILED TO PRESENT THIS COURT WITH A BASIS FOR GRANTING THEIR PETITION FOR A WRIT OF CERTIORARI.

The considerations governing United States Supreme Court review on a writ of certiorari are set forth in Supreme Court Rule 10, which reads, in pertinent part, as follows:

> .1. A review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with a decision of

> another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

While the petition does not cite this rule, or refer specifically to any of the enumerated considerations, the petition does suggest that it seeks the intervention of this Court because the Third Circuit's decision, reversing the District Court and making a finding of personal jurisdiction, conflicts with decisions of the United States Supreme Court. (*See* Petition at 13.)

Upon analysis demonstrated herein, it is clear that the Third Circuit has not misinterpreted any decision of this Court — it has faithfully carried out the principles of *International Shoe, Co. v. Washington*, 326 U.S. 310 (1945) and its progeny. Rather, the petitioners' quarrel is with the facts. Indeed, the petition omits and misstates some crucial facts. Thus, we would restate the petitioners' reason for granting the writ, as set forth on pages 13 and 14 of the petition, in the following language:

> The ostensible reason of exceptional importance for the granting of the petition is the Third Circuit's finding that jurisdiction may be asserted over a Louisiana attorney who, while representing a New Jersey financial institution on an $82 million loan in connection with a real estate mortgage on Louisiana property, committed a fraud in New Jersey at a regularly scheduled conference with a New Jersey financial institution regarding the transaction and who had numerous and varied telephone and letter communications with the New Jersey financial institution in New Jersey.

This restatement highlights the factual differences as seen by the parties. Although we submit that the record is clear, as enunciated by the Third Circuit, this Court should not become involved in evaluating the factual contentions. *See Idaho Dept. of Employment v. Smith,* 434 U.S. 100, 103 (1977)(Stevens, J., dissenting in part) (noting impropriety in granting certiorari on a decision that does not create a conflict among courts and does not involve a question of national importance).

Petitioners have, in fact, recited that no constitutional provisions are at issue with respect to this petition. (*See* Petition at 3.) In short, petitioners have failed to present any "special and important reasons" for this Court to grant their petition for a writ of certiorari.

II.

THE THIRD CIRCUIT CORRECTLY FOUND THAT THE EXERCISE OF PERSONAL JURISDICTION IN NEW JERSEY OVER PETITIONERS IS NOT A VIOLATION OF DUE PROCESS.

The Third Circuit was asked to consider whether the New Jersey long-arm rule confers personal jurisdiction in New Jersey over Louisiana attorneys representing Carteret, a New Jersey financial institution, by virtue of the fact that the attorneys committed a fraud while in New Jersey that caused significant injury to Carteret. The Third Circuit held that "[b]ecause the New Jersey [rule] is coextensive with federal due process, and exercising personal jurisdiction over one who acts tortiously while within the forum state does not deny due process," jurisdiction over this matter is proper in New Jersey. *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 142 (3d Cir. 1992). The Third Circuit also recognized that this "presents a stronger case for exercising personal jurisdiction over the defendants than the effects test employed in *Calder v. Jones* . . ." 954 F.2d at 148 (citation omitted). The Third Circuit further ruled that Shushan failed to present a compelling case of any other considerations which would render jurisdiction unreasonable. Thus, the holding of the Third Circuit and the underlying reasoning rigidly followed the requirements of the due process clause and the controlling precedent.

A. Defendants Have Had Substantial Purposeful Contacts With New Jersey.

The District Court in New Jersey undisputedly has jurisdiction over a non-domiciliary defendant to the extent allowed under New Jersey law and in accordance with the due process clause. *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 63

(3d Cir. 1984). The New Jersey Supreme Court has interpreted the New Jersey "long-arm" rule to permit jurisdiction to be exerted over an out-of-state defendant " 'to the uttermost limits permitted by the United States Constitution.' " *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 469, 508 A.2d 1127, 1131 (1986) (*quoting Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971)).

As the Third Circuit ruled, specific jurisdiction may be exercised over the defendants because its claims are related to and arise from the defendants' contacts with New Jersey. *See Dollar Sav. Bank v. First Sec. Bank of Utah*, 746 F.2d 208, 211 (3d Cir. 1984). This Court also has recognized that the exercise of *in personam* jurisdiction over a non-resident defendant is permissible and does not run afoul of due process if the defendant had

> certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe, 326 U.S. at 316 (citations omitted). In *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court noted:

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), this Court again recognized that "purposeful availment" by the non-resident defendant confers jurisdiction, concluding:

> Thus where the defendant "deliberately" has engaged in significant activities within a state or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

471 U.S. at 475-76 (citations omitted). This Court has also observed that the conduct of the non-resident defendant and his contacts with the forum state should be such that he "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *See also, Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984); *Burger King*, 471 U.S. at 474.

Where — as here — the exercise of "specific jurisdiction" is sought, it must be demonstrated that (i) the defendant purposefully directed his activities at the forum, and (ii) the injuries alleged arose out of or relate to those activities. *Burger King*, 471 U.S. at 472.

The "minimum contacts" test can be satisfied by a *single* act that creates a "substantial connection" with the forum. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). In *McGee*, specific *in personam* jurisdiction was based on defendant's transmittal by mail of a *single* insurance contract to the plaintiff in the forum state. Such contact was found to have had the requisite "substantial connection with the State." 355 U.S. at 223.

There is no dispute that Shushan met with Carteret *in New Jersey* on May 29, 1985. The purpose of the meeting was to review

and "finalize" the Three Lakeway loan documents. One of these documents was the Contractor's Consent Agreement. Shushan's concealment *at the New Jersey meeting* of (i) his unauthorized alteration of the Contractor's Consent Agreement, and (ii) his long-standing and on-going legal representation of Algernon Blair, are the foundation stones of Carteret's claims. Carteret's Complaint further alleges that *during the meeting in New Jersey*, Shushan intentionally and deliberately caused Carteret harm by intentionally failing to advise Carteret of the potential consequences of such alteration. Shushan's deliberate, fraudulent and tortious actions in New Jersey are a "substantial connection" with the forum state and *require* that personal jurisdiction be found over defendants. *See McGee*, 355 U.S. at 223.

Petitioners argue that the Third Circuit's ruling in *Gehling v. St. George's School of Medicine*, 773 F.2d 539 (3d Cir. 1985), is "inapposite and was clearly decided in an 'international' contacts context [sic]." The Third Circuit correctly found that *Gehling* supports its decision herein. 954 F.2d at 148-150. In *Gehling*, the Third Circuit found that a defendant was subject to specific jurisdiction with respect to a claim of fraudulent misrepresentation that allegedly occurred during the defendant's single visit to the forum state and the only contact with plaintiffs within the forum state. In *Gehling*, the plaintiffs brought suit against a West Indian medical school after their son died following his participation in a school-sponsored race. Plaintiffs alleged, *inter alia*, that upon accompanying their deceased son's body to Pennsylvania, the Chancellor of the Medical School misrepresented to them the cause of death. The Court stated:

> *Having traveled to Pennsylvania to return decedent's body, [defendants] clearly availed themselves of the "privilege of acting within" Pennsylvania.* Furthermore, with respect to this claim the [defendants] could reasonably have

> anticipated being haled into court in Pennsylvania to answer for their alleged injurious misrepresentation. Finally, *the cause of action arises from defendants' in-state activities, and the defendants' misrepresentation, which occurred and caused injury in Pennsylvania to Pennsylvania residents,* has a sufficient connection to meet the fair play and substantial justice standard of *International Shoe.*

773 F.2d at 544 (emphasis added). Here, Shushan traveled to New Jersey in order to review with Carteret the Three Lakeway construction loan and made fraudulent misrepresentations while he was in New Jersey. Indeed, the three essential elements of the cause of action occurred in New Jersey: (1) the misrepresentation was made in New Jersey; (2) it was relied upon by Carteret in New Jersey; and (3) Carteret was damaged in New Jersey. Therefore, under *Gehling*, jurisdiction over the defendants is proper in New Jersey.

Jurisdiction is also proper under *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696 (3d Cir. 1990). Although the petition suggests otherwise (*see* Petition at 32), the Third Circuit properly considered the *Mesalic* case in rendering its decision below:

> This result is consistent with our recent decision in *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696 (3d Cir. 1990), where we determined that Fiberfloat, a Florida resident, would not be unduly burdened by the expenses of litigating in New Jersey. 897 F.2d at 701. *New Jersey had a valid interest in protecting its residents from damages arising out of the sale by a non-resident of a defectively manufactured product. Id.* We also rejected the proposition that Florida had a more substantial

> interest than New Jersey, or that Fiberfloat's interest outweighed Mesalic's. Specifically, "Fiberfloat purposefully entered the State of New Jersey to carry out activities in an effort to repair Mesalic's boat. These actions are sufficient to distinguish cases where contacts were insufficient to assert personal jurisdiction." *Id.* at 702. Similarly, Shushan purposefully entered New Jersey in order to further his representation of Carteret with respect to the Three Lakeway closing.

954 F.2d at 151 (emphasis added). It is additionally significant that Shushan's contacts came while perpetrating a fraud upon a New Jersey plaintiff, as opposed to the mere negligence involved in *Mesalic*.

The decision of the Third Circuit is also consistent with the holding of the recent, unanimous decision of the New Jersey Supreme Court in *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 558 A.2d 1252 (1989). In *Lebel*, the Court held that the alleged commission of a fraud against a New Jersey plaintiff confers jurisdiction over a non-domiciliary defendant. Indeed, the New Jersey Supreme Court made it abundantly clear that intentional torts — such as Shushan's fraudulent conduct — require less contacts than other types of torts. The *Lebel* Court stated:

> *Remember* that in this case it is alleged that the defendant's representations via mail and telephone to New Jersey were *fraudulent*.

115 N.J. at 326, 558 A.2d at 1256 (emphasis added). The Court also noted:

> Where a defendant knowingly sends into a state a false statement, intending that it should then be

> relied upon to the injury of a resident of that state, *he has, for jurisdictional purposes, acted within that state.*

115 N.J. at 326, 558 A.2d at 1256 (*quoting Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1066 (4th Cir. 1982)) (emphasis added).

Petitioners rely heavily on two cases which, they contend, weigh against the exercise of personal jurisdiction by New Jersey in the case at bar. First, petitioners cite to *Washington v. Magazzu*, 216 N.J. Super. 23, 522 A.2d 1013 (App. Div. 1987). There, plaintiffs retained Joseph Magazzu, a New Jersey attorney, to represent them in a medical malpractice action against a Virginia hospital. Magazzu communicated with John Wicker, a Virginia attorney and requested that he represent plaintiffs in Virginia. Unfortunately for the plaintiffs, the statute of limitations expired prior to commencement of suit. Plaintiffs brought a legal malpractice suit against Magazzu and the estate of the then deceased Virginia attorney, Wicker. Wicker's sole contacts with New Jersey were that he wrote several letters to Magazzu in New Jersey. Significantly, the Court found that the letters alone showed that Wicker had "purposefully established minimum contacts within New Jersey . . ." 216 N.J. Super. at 27, 522 A.2d at 1016. Yet, the *Washington* court declined to exercise personal jurisdiction because of the *Burger King* considerations of fair play and substantial justice; the Court noted that the "trial within a trial" which would result, as Virginia law would govern the underlying malpractice action, would make the exercise of jurisdiction unreasonable. *Id.* Of course, as the Third Circuit recognized, no such difficulty is presented herein because the allegedly tortious conduct occurred in New Jersey and, thus, New Jersey law would govern. 954 F.2d at 151.

Petitioners' reliance on *Reliance Steel Prods. Co. v. Watson,*

Ess, Marshall & Enggass, 675 F.2d 587 (3d Cir. 1982) is also misplaced. In fact, the rationale of the *Reliance Steel* court supports Carteret's position. In *Reliance Steel*, a Pennsylvania plaintiff brought a breach of contract and legal malpractice action against its former Missouri attorneys. (Of course, Carteret's principal claim of fraud sound in tort.) The *only* "contacts" by the non-resident attorneys were the placing of an advertisement in the *Martindale Hubbell Law Directory* that circulates in the forum and the attorneys' phone calls and rendering of a bill to its Pennsylvania clients. The non-resident attorney *never travelled to Pennsylvania* to meet with their clients to render legal representation and *did not communicate by mail to Pennsylvania* in order to provide legal advice. Further, the cause of action related solely to an alleged negligent handling of a replevin action in Kansas. The property was located in Kansas and the order of replevin was issued in Kansas. 675 F.2d at 589. The *Reliance Steel* court found, on the basis of the factual record, that Pennsylvania had the "least significant contacts" to the claims asserted and, therefore, denied jurisdiction. The Third Circuit recognized that, in stark contrast to *Reliance Steel*, the record here establishes that Shushan purposefully availed himself of the privileges of acting within New Jersey by traveling to New Jersey to consult with his client. 954 F.2d at 149-150.

Petitioners argue that they did not purposely avail themselves of the privileges of acting in New Jersey, as required by *Hanson v. Denckla*, 357 U.S. at 253. (*See* Petition at 27-30.) Petitioners seek to minimize the Third Circuit's findings that Shushan had significant contacts with New Jersey. However, the record is clear. Shushan traveled to New Jersey for a regularly scheduled meeting with Carteret and committed a fraud *at that meeting*. Only after that meeting did Carteret close on the $82 million dollar loan. Finally, Shushan made numerous telephone calls and repeatedly sent letters to New Jersey. Petitioners thereby purposely availed themselves of the privileges of acting within the forum state, as

the Third Circuit recognized when it ruled that personal jurisdiction over defendants existed in New Jersey. 954 F.2d at 149-150.

B. Jurisdiction Is Also Proper Over Defendants Under The "Effects" Doctrine.

The District Court in New Jersey can also exercise personal jurisdiction over defendants under the "effects" doctrine, as enunciated by this Court in *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, the plaintiff brought suit in California, her state of residence, against Calder (the president and editor of *The National Enquirer*) and others, alleging libel, invasion of privacy and intentional infliction of emotional distress — *all intentional torts*. 465 U.S. at 783. Defendant Calder moved to dismiss for lack of *in personam* jurisdiction and argued that (i) all of his actions with respect to the libelous article took place in Florida, where he lived and worked and where the newspaper was published, and (ii) he had only been to California twice in his life and both trips were entirely unrelated to the subject matter of the lawsuit. This Court found that jurisdiction was proper over Calder because the complaint did not allege negligence but intentional wrongdoing, which was an altogether different matter:

> [P]etitioners are not charged with *mere untargeted negligence*. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California.

465 U.S. at 789 (emphasis supplied). Further, this Court held:

> In this case, petitioners are primary participants in an alleged wrongdoing *intentionally directed at a California resident*, and jurisdiction over them is proper *on that basis*.

465 U.S. at 790 (emphasis supplied). It cannot be stated more clearly: when a complaint charges intentional wrongdoing, directed at a specific person or entity in another state, and that person is injured, there is personal jurisdiction.

New Jersey courts have adopted the "effects" doctrine. *See Blessing v. Prosser*, 141 N.J. Super. 548, 550, 359 A.2d 493, 494 (App. Div. 1976); *Moon Carrier v. Reliance Ins. Co.*, 153 N.J. Super. 312, 325-26, 379 A.2d 517, 524-25 (Law Div. 1977). The *Blessing* Court cited with approval *Restatement (Second) of Conflicts of Laws* § 37, which states:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

141 N.J. Super. at 550, 359 A.2d at 494.

Carteret's Complaint sets forth in detail allegations of fraud against Shushan that caused injury to Carteret in New Jersey (*See* Respondent Appendix at 14a-23a.) Therefore, under *Calder*, the intentional, tortious conduct of petitioners, which had harmful "effects" in New Jersey upon a New Jersey plaintiff, requires the exercise of jurisdiction over Shushan. As the Third Circuit recognized, the facts of this case are even more compelling in favor of the exercise of jurisdiction than those in *Calder*, because, unlike in *Calder*, Shushan came into New Jersey to perpetrate his fraud. 954 F.2d at 147-148.

C. Defendants Cannot Present A "Compelling Case" That The Finding Of Jurisdiction Would Be Unreasonable.

The jurisdictional analysis does not end if a court finds sufficient minimum contacts. As this Court stated in *Burger King*:

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice."

471 U.S. at 476. These "other factors" are: (1) The forum state's interest in adjudicating the dispute; (2) The plaintiff's interest in obtaining convenient and effective relief; (3) The interstate judicial system's interest in obtaining the most efficient resolution of controversies; (4) The burden on the defendant; and (5) The shared interest of the several states in furthering substantive social policies. *See World-Wide Volkswagen,* 444 U.S. at 292. With regard to this "prong" of the analysis, the *defendant* has the considerable burden of presenting a "compelling case" to overcome the weight of the "minimum contacts" and defeat jurisdiction:

> [W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, *he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.*

Burger King, 471 U.S. at 477 (emphasis added).

The Third Circuit ruled that Shushan did not meet his burden to present a compelling case that, his minimum contacts with the

forum notwithstanding, jurisdiction would be unreasonable. Further, a review of the "relevant factors" identified by this Court in *World-Wide Volkswagen* and *Burger King* strongly favors the exercise of jurisdiction over petitioners.

One factor to consider is the interest of the New Jersey forum in adjudicating the dispute between Carteret and petitioners. New Jersey has a "significant interest in adjudicating fraudulent misrepresentations occurring within its boundaries," as noted by the Third Circuit. 954 F.2d at 150. New Jersey's interest is heightened because the intentional tort was committed on a New Jersey financial institution, which maintains its headquarters in New Jersey, which maintains various branches and offices in New Jersey, and which employs hundreds of New Jersey citizens. The petitioners' repeated assertion that the omission or failure to discuss a material provision of the Contractor's Consent Agreement could not be considered an intentional or fraudulent misrepresentation is a misstatement of a well-settled New Jersey law. *See, e.g., Medivox Prod., Inc. v. Hoffman-LaRoche, Inc.*, 107 N.J. Super. 47, 69-70 (Law Div. 1969), wherein Judge (now New Jersey Supreme Court Justice) Handler wrote that "[a] fraudulent misrepresentation may inhere in a statement which is truthful so far as it goes but which is materially misleading because of the failure to recite qualifying matters . . . [and thus] intentional concealment of material information is tantamount to an affirmative misrepresentation of the non-existence of such information." The Third Circuit held that, because Shushan's allegedly tortious conduct occurred in New Jersey, the law of New Jersey with regard to fraud, would, in fact, govern. 954 F.2d at 151. Petitioners incorrectly assert that Louisiana law would apply. (*See* Petition at 40.)

A second consideration is the plaintiff's interest in obtaining convenient and effective relief. Of course, Carteret is a New Jersey institution with its principal place of business in this forum, which

further weighs in favor of New Jersey jurisdiction. *See Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. at 473, 508 A.2d at 1133.

A third factor to consider is the interstate judicial system's interest in obtaining the most efficient resolution of controversies. This factor was also considered by the Third Circuit, which recognized that Carteret had submitted ten affidavits and certifications from witnesses declaring either that the witnesses were willing to travel to New Jersey for deposition and trial, or that New Jersey would be the *more* convenient location for them; additional sworn testimony stated that all of Carteret's documentation concerning the Three Lakeway project was located in New Jersey. 954 F.2d at 150. Shushan has not presented evidence to rebut any of this testimony.

Indeed, the primary *World-Wide Volkswagen/Burger King* factor on which petitioners focus is the burden to which Shushan would allegedly be subject by a trial in New Jersey. As stated in the Third Circuit opinion below, petitioners "do not explain what burden, other than inconvenience, would be visited upon them should they be required to litigate in New Jersey . . . [and they thereby] misapprehend their burden to make a compelling case against the exercise of personal jurisdiction." 954 F.2d at 150.

The final factor enumerated by this Court is the shared interest of the several states in furthering substantive social policies. While petitioners argue that Louisiana should govern the conduct of Louisiana attorneys, petitioners cannot deny that Louisiana and New Jersey have some shared interest in remedying victims of attorneys who fraudulently deceive their clients.

In sum, petitioners cannot sustain their burden to present a compelling case that jurisdiction in New Jersey would be unreasonable.

CONCLUSION

The petition for a writ of certiorari filed by Shushan and the Shushan Firm should be denied.

Respectfully submitted,

ANTHONY J. SYLVESTER
Counsel of Record

VITO A. GAGLIARDI, JR.
On the Brief

RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Respondent
CARTERET SAVINGS BANK, FA

DATED: June 8, 1992

APPENDIX A — COMPLAINT DATED DECEMBER 5, 1989

[Stamped
ORIGINAL FILED
DEC 5 1988
William T. Walsh, Clerk]

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
HEADQUARTERS PLAZA
ONE SPEEDWELL AVENUE
MORRISTOWN, N.J. 07960-1981
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ATTORNEYS FOR Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178 (NHP)

CARTERET SAVINGS BANK FA,

Plaintiff,

vs.

LOUIS J. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

COMPLAINT

Plaintiff, by way of complaint against defendants, says:

Appendix A

1. Plaintiff Carteret is a Federal association organized and existing under the laws of the United States, and having its principal place of business at 200 South Street, Morristown, New Jersey.

2. Defendants Louis J. Shushan ("Shushan"), Donald A. Meyer, Rader Jackson, Jacqueline McPherson and Mitchell W. Herzog are persons of the full age of majority domiciled in New Orleans, Louisiana.

3. Defendant, the law firm of Shushan, Meyer, Jackson, McPherson and Herzog, is a Louisiana partnership having its principal place of business in New Orleans, Louisiana ("the Shushan Firm").

JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked under 28 U.S.C. 1332(a) in that the amount in controversy exceeds $10,000.00, exclusive of costs and interest, and that the parties are citizens of different states.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391 in that the claims arose in this district and plaintiff resides in this district.

COUNT ONE

6. On June 12, 1985, Carteret entered into a construction loan agreement with Three Lakeway Center Partnership ("Three Lakeway"), pursuant to which Carteret agreed to provide financing for the construction of a multi-use project ("the Project") being developed by Three Lakeway in Metairie,

Louisiana. On the same day, Three Lakeway entered into a construction contract ("the Construction Contract") with Algernon Blair, Inc. ("Blair"), pursuant to which Blair agreed to construct the Project.

7. On June 12, 1985, Three Lakeway and Carteret also entered into a collateral assignment ("the Collateral Assignment"), pursuant to which Three Lakeway assigned all of its rights and interests under the Construction Contract to Carteret as partial security for Three Lakeway's obligations under the construction loan agreement. On the same day, Blair and Carteret entered into a contractor's consent and certification agreement ("the Contractor's Consent"), pursuant to which Blair acknowledged and consented to the Collateral Assignment.

8. In a civil action pending in the United States District Court for the Eastern District of Louisiana entitled "SNS Contractors, Inc. v. Algernon Blair, Inc.," No. 88-1371 ("the Blair Litigation"). Blair has asserted against Carteret a third-party demand in the amount of $2,940,985. In its third-party demand, Blair asserts that Carteret is liable to Blair under the terms of the Contractor's Consent.

9. Although Carteret has denied all liability to Blair, in the event that Carteret is cast in judgment to Blair for any amount pursuant to the Contractor's Consent, then defendants are liable to Carteret in the same amount for the following reasons.

10. Shushan and the Shushan firm acted as legal counsel for Carteret in connection with the negotiation and legal execution of the Contractor's Consent that serves as the basis for Blair's claim against Carteret. In this regard, Shushan and the Shushan firm acted as Carteret's sole contacts with Blair with respect to the terms of the Contractor's Consent. In the course of their

representation of Carteret, Shushan and the Shushan firm breached the fiduciary duties they owed to Carteret in the following non-exclusive respects:

(a) By failing to fully disclose to Carteret the nature and extent of their prior and ongoing legal representation of Blair in connection with other matters and to obtain Carteret's consent to this conflict of interest;

(b) By failing to advise Carteret that they could not properly negotiate the terms of the Contractor's Consent with Blair on Carteret's behalf by reason of their conflicts of interest and that Carteret should retain other counsel for that purpose;

(c) By failing to protect adequately Carteret' interests during negotiations with Blair with respect to the Contractor's Consent, and by agreeing on Carteret's behalf to terms in the Contractor's Consent that were grossly unfavorable to Carteret and favorable to Blair;

(d) By failing to inform Carteret that the terms of the Contractor's Consent were grossly unfavorable to Carteret in relation to the relative bargaining powers of the parties and/or by misrepresenting to Carteret the nature of their negotiations with Blair concerning the terms of the Contractor's Consent; and

(e) By failing to inform Carteret adequately of the potential adverse legal effects of the Contractor's Consent.

11. Defendants Meyer, Jackson, McPherson and Herzog are liable to plaintiff for the acts and conduct of Shushan and the Shushan firm.

Appendix A

12. Had defendants not breached the fiduciary duties they owed to Carteret, Carteret would not have executed the Contractor's Consent in its present form and, therefore, Carteret would not be liable to Blair under the terms of the Contractor's Consent. Accordingly, any loss suffered by Carteret by reason of the Contractor's Consent was directly caused by the breaches of fiduciary duties by Shushan and the Shushan Firm.

WHEREFORE, plaintiff Carteret demands judgment against defendants (i) in the same amount, if any, for which Carteret is cast in judgment to Blair in the Blair Litigation, plus all costs incurred by Carteret in connection with the Blair Litigation; and (ii) for all other relief to which Carteret is entitled.

DEMAND FOR TRIAL BY JURY

Plaintiff demands trial by jury as to all issues so triable.

RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Plaintiff

By: s/ Gerald A. Liloia
GERALD A. LILOIA

Appendix A

CERTIFICATION UNDER R. 4:5-1

The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding except for the action referred to in paragraph 8 of this Complaint. No other action or arbitration proceeding is presently contemplated.

RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Plaintiff
Carteret Savings Bank FA

By: s/ Gerald A. Liloia
GERALD A. LILOIA

Dated: December 5, 1988.

Appendix A

CERTIFICATION UNDER GENERAL RULE 47

I hereby certify that upon my knowledge of the facts and the applicable law and pursuant to Rule 47 C.4. of the General Rules of this court, the damages recoverable in this action exceed the sum of $75,000.00 exclusive of interest, costs, and any claim for punitive damages.

s/ Gerald A. Liloia
GERALD A. LILOIA

Dated: December 8, 1988.

APPENDIX B — ANSWER DATED JANUARY 24, 1989

TOMPKINS, MCGUIRE & WACHENFELD
FOUR GATEWAY CENTER
100 MULBERRY ST.
NEWARK, N.J. 07102-4070
(201) 622-3000
ATTORNEYS FOR Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178(NHP)

CARTERET SAVINGS BANK FA,

Plaintiff,

v.

LOUIS J. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

ANSWER, DEMAND FOR JURY TRIAL AND DAMAGES

Defendants, Louis J. Shushan, Donald A. Meyer, Rader Jackson, Jacqueline McPherson, Mitchell W. Herzog and Shushan, Meyer, Jackson, McPherson and Herzog, located in the State of Louisiana, by way of answer to the Complaint filed herein, alleges and says:

1. The First Paragraph does not contain any allegations

against these defendants and, therefore, no responsive pleading is necessary.

2. Defendants admit the allegations of Paragraph Two.

3. Defendants admit the allegations of Paragraph Three.

JURISDICTION AND VENUE

4. Defendants deny the allegations of Paragraph Four.

5. Defendants deny the allegations of Paragragh Five.

COUNT ONE

6. The Sixth Paragraph does not contain any allegations against these defendants and, therefore, no responsive pleading is necessary.

7. The Seventh Paragraph does not contain any allegations against these defendants and, therefore, no responsive pleading is necessary.

8. The Eighth Paragraph does not contain any allegations against these defendants and, therefore, no responsive pleading is necessary.

9. Defendants deny the allegations of Paragraph Nine.

10. Defendants deny the allegations of Paragraph Ten in its entirety.

11. Defendants deny the allegations of Paragraph Eleven.

Appendix B

12. Defendants deny the allegations of Paragraph Twelve.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

There is lack of jurisdiction over the person of the defendants by reason of insufficiency of minimal contact.

SECOND SEPARATE DEFENSE

There is lack of jurisdiction over the person of the defendants by reason of insufficiency of process and insufficiency of service of process.

THIRD SEPARATE DEFENSE

Any and all damages sustained were the result of a third party over whom these defendants had no control.

FOURTH SEPARATE DEFENSE

The claim of the plaintiff is barred as a matter of law because of the doctrine of res judicata.

FIFTH SEPARATE DEFENSE

Plaintiffs are collaterally estopped from bringing this litigation because the facts and circumstances which give rise to this litigation have been adjudicated and determined by the United States Court for the Eastern District of Louisiana and *S&S Contractors, Inc. v. Algenon Blair, Inc.*, Civil Action No. 88-1372 Section "H" Magistrate Division 5 consolidated with *Fishback & Moore, Inc.*

Appendix B

v. Algenon Blair Inc. et al., Civil Action No. 88-1424, Section "H", Magistrate Division 5.

SIXTH SEPARATE DIVISION

The applicable law, rule, statute or regulation, including, but not limited to, the statute of limitations, controlling or requiring the institution of suit with any certain period of time following its accrual was not complied with by the plaintiff, and, accordingly, the plaintiff's claim is barred as a matter of law.

SEVENTH SEPARATE DEFENSE

The rights and remedies of the parties to this action are controlled by the laws of the State of Louisiana.

EIGHTH SEPARATE DEFENSE

The claimant was guilty of contributory negligence and failing to exercise due and proper care under the existing circumstances and conditions.

NINTH SEPARATE DEFENSE

The Complaint herein fails to state a claim upon which relief can be granted and these defendants reserve the right to move at or before the time of trial to dismiss the Complaint.

TENTH SEPARATE DEFENSE

Venue in this forum is improper since it would cause an undue burden and hardship to the defendants and any witnesses on their behalf in litigating this matter within this forum. All the acts and

events which give rise to this litigation occurred within the State of Louisiana.

ELEVENTH SEPARATE DEFENSE

Subsequent to the incident complained of, plaintiff answered to the proceeding before another tribunal possessing jurisdiction over the incident complained of, and has thus elected a remedy different and repugnant to the remedy sought herein.

WHEREFORE, defendants demand judgment dismissing the plaintiff's Complaint.

JURY DEMAND

Defendants demand trial by jury on all issues.

DEMAND FOR DAMAGES

Pursuant to U.S. District Court Rule 8(g) these defendants demand a statement of damages within ten (10) days.

TOMPKINS, McGUIRE &
WACHENFELD
Attorneys for Defendants

By: s/ Charles F. Brennan
Charles F. Brennan

Dated: 1/24/89

Appendix B

CERTIFICATION

The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding except *S&S Contractors, Inc. v. Algenon Blair, Inc., et al.*, Civil Action No. 88-1372, Section "H", Magistrate Division 5 consolidated with *Fishback and Moore, Inc.v. Algenon Blair, Inc., et al.*, Civil Action No. 88-1424, Section "D", Magistrate Division 5 before the United States District Court for the Eastern District of Louisiana. No other action or arbitration proceeding is presently contemplated.

TOMPKINS, McGUIRE &
WACHENFELD
Attorneys for Defendants

By: s/ Charles F. Brennan
Charles F. Brennan

DATED: 1/24/89

APPENDIX C — FIRST AMENDED COMPLAINT DATED JUNE 15, 1991

RIKER, DANZIG, SCHERER & HYLAND
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

Attorneys for Plaintiff,
CARTERET SAVINGS BANK, FA

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178 (NHP)

CARTERET SAVINGS BANK, FA,

Plaintiff,

v.

LOUIS G. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Carteret Savings Bank, FA ("Carteret"), by way of First Amended Complaint against defendants, says:

Appendix C

1. Carteret is a Federal Association organized and existing under the laws of the United States, and has its principal place of business at 200 South Street, Morristown, New Jersey.

2. Defendants Louis J. Shushan ("Shushan"), Donald A. Meyer, Rader Jackson, Jacqueline McPherson and Mitchell W. Herzog (hereinafter the "Defendants"), are persons of the full age of majority, and, upon information and belief, domiciled in New Orleans, Louisiana.

3. Defendant Shushan, Meyer, Jackson, McPherson and Herzog is a Louisiana Partnership having its principal place of business in New Orleans, Louisiana (the "Shushan Law Firm").

JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1332(a) in that the amount in controversy exceeds $10,000.00, exclusive of costs and interest, and that the parties are citizens of different states.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391 in that the claims arose in this District, and Carteret's principal place of business is located in this District.

COUNT ONE

6. On June 12, 1985, Carteret entered into a Construction Loan Agreement with Three Lakeway Center Partnership ("Three Lakeway"), pursuant to which Carteret agreed to provide financing for the construction of a multi-use project ("the Project") being developed by Three Lakeway in Metairie, Louisiana. On the same day, Three Lakeway entered into a

Construction Contract (the "Construction Contract") with Algernon Blair, Inc. ("Algernon Blair"), pursuant to which Algernon Blair agreed to act as the general contractor on the Project.

7. On June 12, 1985, Three Lakeway and Carteret also entered into a collateral assignment (the "Collateral Assignment"), pursuant to which Three Lakeway assigned to Carteret all of its rights and interests under the Construction Contract as partial security for Three Lakeway's obligations under the Construction Loan Agreement.

8. Also, on June 12, 1985, Algernon Blair and Carteret entered into a Contractor's Consent and Certification Agreement (the "Contractor's Consent"), pursuant to which, *inter alia*, Algernon Blair acknowledged and consented to the Collateral Assignment.

9. In a civil action brought in the United States District Court for the Eastern District of Louisiana entitled *SNS Conractors, Inc. v. Algernon Blair, Inc.*, Civil Action No. 88-1371 (the "Algernon Blair Litigation"), Algernon Blair asserted against Carteret a third-party demand in the amount of $2,940,985. In such demand, Algernon Blair asserted that Carteret was liable to Algernon Blair under the terms of the Contractor's Consent.

10. Although Carteret had denied all liability to Algernon Blair, judgment was entered in the Algernon Blair Litigation in favor of Algernon Blair and against Carteret in the amount of $1,498,304.

11. Shushan and the Shushan Firm acted as legal counsel for Carteret in connection with the negotiation and execution of the

Appendix C

Contractor's Consent that served as the basis for (a) Algernon Blair's claim against Carteret and (b) the Court's finding in the Algernon Blair Litigation of liability on the part of Carteret and entry of judgment against Carteret.

12. As Carteret's legal counsel as aforesaid, Shushan and the Shushan Firm acted as Carteret's sole contacts with Algernon Blair with respect to the terms of the Contractor's Consent. In the course of their representation of Carteret as aforesaid, Shushan and the Shushan Firm intentionally breached the fiduciary duties owed to Carteret in the following nonexclusive respects:

(a) By failing to fully disclose to Carteret the nature and extent of their prior and ongoing legal representation of Algernon Blair in connection with other matters and to obtain Carteret's waiver of this conflict of interest;

(b) By failing to advise Carteret that they could not properly negotiate on Carteret's behalf the terms of the Contractor's Consent with Algernon Blair by reason of their conflict of interest and that Carteret should retain other legal counsel for that purpose.

(c) By failing to protect adequately Carteret's interest during negotiations with Algernon Blair with respect to the Contractor's Consent, and by agreeing on Carteret's behalf to terms in the Contractor's Consent that were grossly unfavorable to Carteret and, instead, favorable to Algernon Blair;

(d) By modifying and amending the terms of the Contractor's Consent, without notice to or the authorization of Carteret, so as to incorporate language pursuant to which the Court in the Algernon Blair Litigation found Carteret to be liable to Algernon Blair for certain payments totaling in the aggregate $1,498,304;

(e) By failing to inform Carteret that the terms of the Contractor's Consent were grossly unfavorable to Carteret in relation to the relative bargaining powers of the parties and/or by intentionally misrepresenting to Carteret the nature of their negotiations with Algernon Blair concerning the terms of the Contractor's Consent; and

(f) By failing to adequately inform Carteret of the potential adverse legal effects of the terms of Contractor's Consent, as modified by defendants without Carteret's knowledge or consent.

13. Defendants Meyer, Jackson, McPherson and Herzog are each liable to plaintiff for the wrongful acts and conduct of Shushan and the Shushan Firm.

14. Had defendants not breached fiduciary duties owed to Carteret, Carteret would not have entered into the Contractor's Consent in the form executed and, therefore, Carteret would not have been found liable to Algernon Blair under the terms of the Contractor's Consent. Accordingly, the losses suffered, including, but not limited to, those related to the judgment entered in the

Appendix C

Algernon Blair Litigation, were directly and proximately caused by the wrongful conduct and breach of fiduciary duties by Shushan and the Shushan Firm.

WHEREFORE, plaintiff Carteret demands that judgment be entered in its favor against defendants, jointly and severally: (i) in the amount of $1,498,304.00, plus all costs incurred by Carteret, including attorneys' fees, in connection with the Algernon Blair Litigation; and (ii) for all other relief to which Carteret is entitled.

COUNT TWO

15. Plaintiffs reallege and incorporate paragraphs one through fourteen as if set forth herein at length.

16. Prior to May 29,1985, Louis Shushan and the Shushan Firm, without notice to or the consent of Carteret, and in order to benefit the financial interest of Algernon Blair, modified and altered the Conractor's Consent so as to incorporate the following provision:

> Notwithstanding the above, in the event of any default by Borrower under the Loan Agreement as aforesaid, Lender agrees that the Contractor shall be paid for the work done by it up to the date of such default and termination of the Construction Contract by Lender, including a pro-rata share of its construction fee and retainage.

As a direct result of this provision, which the Court found to be a guarantee by Carteret of the obligation of Three Lakeway to Algernon Blair, the Court in the Algernon Blair Litigation found

that Carteret was liable to Algernon blair in the amount of $1,498,304.

17. Shushan and the Shushan Firm did not request and did not obtain consent or authorization from Carteret to modify and alter the Contractor's Consent, as aforesaid.

18. On May 29, 1985, Shushan met with Carteret and Carteret's counsel in Roseland, New Jersey, at the offices of Carteret's New Jersey counsel, for the purpose of rendering legal advice to Carteret and reviewing and finalizing all documents relating to the Three Lakeway Construction Loan, including, but not limited to, the Contractor's Consent. Shushan knew at that and all other relevant times that Carteret was relying upon him and his Firm to represent Carteret's best interests, without any consideration to any competing or conflicting interests of any other person or entity involved in the Three Lakeway Project.

19. At the said May 29, 1985 meeting with Carteret and at all other times throughout his representation of Carteret in connection with the Three Lakeway Construction Loan, Shushan intentionally failed to disclose to Carteret (a) the fact of and details relating to his professional relationship with and prior and/or current representation of Algernon Blair, as well as his personal relationship with its senior executives; (b) the unauthorized modification he had made to the Contractor's Consent, as aforesaid; and (c) the potential legal effect and consequences to Carteret of such unauthorized modification.

20. Shushan and the Shushan Firm acted wrongfully at the May 29, 1985 New Jersey meeting and at all other relevant times during the course of its representation of Carteret, in the following non-exclusive respects:

Appendix C

(a) by deliberately failing to disclose to Carteret and others present that they had amended the Contractor's Consent to the benefit of Algernon Blair and to the detriment of Carteret;

(b) by deliberately failing to secure Carteret's consent to the amendment;

(c) by intentionally failing to inform and advise Carteret of the purpose and legal consequences of the unauthorized amendment to the Contractor's Consent;

(d) by concealing from Carteret their prior communications with Algernon Blair concerning the Contractor's Consent;

(e) by intentionally failing to disclose their long-standing professional and personal relationship with Algernon Blair; and

(f) by taking deliberate actions to benefit their long-standing client, Algernon Blair, to the significant detriment of Carteret.

21. Shushan and the Shushan Firm knew that Carteret relied on them to represent its interests and that Carteret could incur substantial liability as a result of Shushan's failure to disclose the unauthorized amendment of the Contractor's Consent and the legal effect thereof and his long-term attorney-client relationship with Algernon Blair.

22. Carteret has been substantially harmed, as set forth in

paragraph 16 hereof, as a result of the wrongful, deliberate conduct of Shushan and the Shushan Firm and its reliance on the misrepresentations and intentional nondisclosures by defendants.

WHEREFORE, plaintiff Carteret demands judgment against defendants (i) in the amount of $1,498,304.00, plus all costs, including attorneys' fees, incurred by Carteret in connection with the Algernon Blair Litigation; (ii) all other compensatory damages; (iii) punitive damages; and (iv) for all other relief to which Carteret may be entitled.

DEMAND FOR TRIAL BY JURY

Plaintiff demands trial by jury as to all issues to triable.

RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Plaintiff
CARTERET SAVINGS BANK,
FA

By: s/ Anthony J. Sylvester
ANTHONY J. SYLVESTER

DATED: June 4, 1991

Appendix C

CERTIFICATION UNDER GENERAL RULE 47

I hereby certify that upon my knowledge of the facts and the applicable law and pursuant to Rule 47 C.4. of the General Rules of this Court, the damages recoverable in this action exceed the sum of $100,000 exclusive of interest, costs and any claim for punitive damages.

s/ Anthony J. Sylvester
ANTHONY J. SYLVESTER

DATED: June 4, 1991

APPENDIX D — AFFIDAVIT OF JOSEPH TOCKARSHEWSKI DATED APRIL 14, 1989

RIKER, DANZIG, SCHERER & HYLAND
Headquarters Plaza II
One Speedwell Avenue
Morristown, New Jersey 07962-1981

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178 (NHP)

CARTERET SAVINGS BANK, FA,

Plaintiff,

vs.

LOUIS J. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

Civil Action

AFFIDAVIT OF JOSEPH TOCKARSHEWSKY

I, JOSEPH TOCKARSHEWSKY, of full age, being duly sworn according to law, upon my oath depose and say:

1. I am presently employed as Executive Vice President of

Appendix D

American Security Bank, located in Washington, D.C.

2. During the period from approximately February 1982 through May 1985 I was Executive Vice President and Senior Real Estate Loan Officer at Carteret Savings Bank, FA in Morristown, New Jersey. Prior to working with Carteret, I was in charge of the commercial real estate department of Irving Trust Company in New York City.

3. While at Irving Trust we retained Louis Shushan, a New Orleans attorney, to represent us in connection with two or three construction loans in the New Orleans area.

4. In late 1984 John Yemelos called me to determine Carteret's interest in financing a construction project in Metarie, Louisiana known as Lakeway Three. I came to know Mr. Yemelos while at Irving Trust. Irving Trust had provided construction financing for a project known as Lakeway One which was developed by Mr. Yemelos.

5. After review, Carteret decided that it would provide construction financing to the Lakeway Three project. In or about December 1984 I telephoned Mr. Shushan from my office in New Jersey and retained him to represent Carteret in this matter. Mr. Shushan's responsibility was to prepare all necessary closing documents and to do whatever was necessary to protect Carteret's interest with respect to this loan.

6. At approximately the same time, Carteret retained Herb Rinaldi, Esq. of the New Jersey law firm of Carella, Byrne, Bain & Gilfillan for the purpose of preparing the loan commitment letter to Lakeway Three and to provide oversight with respect to the loan documents. Mr. Rinaldi was also asked at a later time

to prepare a participation agreement among the various lenders who participated with Carteret in providing the construction financing to Lakeway Three.

7. The commitment letter set forth the terms and conditions of the loan. It also stated that Algernon Blair, Inc. would be the general contractor for the construction of the project. A copy of the loan commitment letter was sent to Mr. Shushan after it was prepared. At no time did Mr. Shushan tell me that he had represented Algernon Blair in other matters or that he felt there was a conflict of interest in his representing Carteret in a project involving Algernon Blair.

8. At no time from the point of my retaining Mr. Shushan to the time I left the bank in May 1985, did Mr. Shushan tell me that Algernon Blair had requested or insisted that Carteret guarantee the obligations of Three Lakeway to Algernon Blair under the construction contract.

9. At no time did Mr. Shushan discuss with me the terms of the contractors consent agreement nor did I ever authorize Mr. Shushan to insert in the contractors consent agreement a provision that Carteret would guarantee the obligations of Three Lakeway under the construction contract. Had I been asked, I would not have consented to the guarantee.

10. Had Mr. Shushan informed me that he had represented Algernon Blair in the past on any significant matter or that he had a conflict of interest, I would not have retained him to represent Carteret in the Three Lakeway matter.

s/ Joseph B. Tockarshewsky
JOSEPH TOCKARSHEWSKY

Appendix D

Sworn to and subscribed before me this
14th day of April, 1989.
District of Columbia

s/ Helen M. Kortec
My Commission Expires May 14, 1990

APPENDIX E — AFFIDAVIT OF STEVEN COLE DATED APRIL 25, 1989

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Attorneys for Plaintiff,
CARTERET SAVINGS BANK, FA

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178 (NHP)

CARTERET SAVINGS BANK, FA,

Plaintiff,

v.

LOUIS G. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

AFFIDAVIT OF STEVEN A. COLE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

Appendix E

STATE OF NEW JERSEY)
) : ss.
COUNTY OF MORRIS)

I, STEVEN A. COLE, of full age, being duly sworn according to law, upon my oath, depose and say:

1. I am a Vice President of Carteret Savings Bank, FA ("Carteret"), plaintiff in the above-captioned matter, which has its principal place of business at 200 South Street, Morristown, New Jersey. I am fully familiar with the facts set forth herein and those relating to this action and I submit this Affidavit on behalf of Carteret (i) in support of Carteret's Cross-Motion for leave to file a First Amended Complaint in the form annexed to the Notice of Cross-Motion filed herewith, and (ii) in opposition to defendants' Motion to dismiss the Complaint on the grounds that the Court lacks personal jurisdiction over them.

2. In late 1984, Carteret agreed to enter into a Construction Loan Agreement with Three Lakeway Center Partnership under which it would lend $82 million to Three Lakeway to finance the construction of a "mixed use" building project located in Metairie, Louisiana (hereinafter "Three Lakeway"). There were to be other participating lenders. Carteret acted as the lead lender for the loan.

3: In late 1984, Mr. Joseph Tockarshewsky, at that time an Executive Vice President of Carteret, and I communicated with Louis Shushan, Esq. and his law firm Shushan, Meyer, Jackson, McPherson & Herzog (the "Shushan Firm"), to discuss retaining Shushan, and the Shushan Firm, to represent Carteret and its co-lenders in the negotiation and preparation of the Three Lakeway loan documents. Carteret did, in fact, retain Shushan and the Shushan Firm at that time to perform said legal services.

Appendix E

4. On May 29, 1985, a meeting was held at the offices of Carella, Byrne, Bain and Gilfillan, in Roseland, New Jersey, which was attended by representatives of the participants to the loan agreement, Louis Shushan, Herbert Rinaldi, Carteret's New Jersey counsel, and me. The purpose of this meeting was, in part, to finalize the numerous loan documents prepared by Mr. Shushan and to hear from Mr. Shushan with respect to any problems relating thereto. Mr. Shushan had been working on these documents for months and we totally relied on him to see to it that Carteret's interests were protected. We also relied on Mr. Shushan and his firm to advise us as to the legal ramifications to Carteret of the construction loan documents to be executed at closing. One of these documents was the Contractor's Consent Agreement between Carteret and Algernon Blair. (Exhibit A hereto.)

5. At no time during this meeting in New Jersey did Shushan inform me that he had modified the terms of the Contractor's Consent Agreement without Carteret's authorization. (Compare paragraph 3(d) of executed agreement, Exhibit A, with the same paragraph of one of the drafts prepared by Mr. Shushan, annexed as Exhibit B hereto.) Mr. Shushan never requested nor was he ever given authority from Carteret to modify the Contractor's Consent Agreement with Algernon Blair so as to provide a guaranty from Carteret to Algernon Blair. Mr. Shushan never told us of any communications with Algernon Blair regarding a modification of the Contractor's Consent Agreement.

6. Furthermore, at no time between the May 29, 1985 meeting in New Jersey and the closing of the Construction Loan on June 12, 1985 did Louis Shushan or anyone at the Shushan Firm inform me or anyone else at Carteret of his unauthorized modification of the Contractor's Consent Agreement or the purpose and

potential legal consequences to Carteret of such modification.

7. Shushan did not advise me at the time he was retained that he and his firm had a long-standing professional relationship with Algernon Blair, Inc. ("Algernon Blair"), the construction company that was designated to build the Three Lakeway project. To the best of my knowledge, Shushan also did not advise Mr. Tockarshewsky, or anyone else affiliated with Carteret, of his relationship with Algernon Blair.

8. Further, I state without equivocation that at no time from Carteret's retention of Shushan and the Shushan Firm through the closing of the Three Lakeway Construction loan on June 12, 1985 — including the May 29, 1985 New Jersey meeting — did Shushan disclose the details of his long-standing professional relationship with Algernon Blair. Further, at no time did Shushan request that Carteret waive the conflict presented by the opposing interests of Carteret and Algernon Blair with regard to the negotiation of the terms of the Contractor's Consent Agreement executed by them.

9. Both prior to and following my May 29, 1985 meeting in Roseland, New Jersey with Louis Shushan, there were numerous and continuous communications — both by telephone and by mail — by Shushan and the Shushan Firm to Carteret and its attorneys in New Jersey. (*See* Exhibit E to the accompanying Certification of Anthony J. Sylvester, Esq.)

10. Further, Mr. Shushan frequently called me in New Jersey to render legal advice regarding the Three Lakeway construction loan transaction.

11. Despite their numerous communications, at no time did

Shushan or anyone else at the Shushan Firm disclose to me or, to the best of my knowledge, anyone else at Carteret that he had modified the Contractor's Consent Agreement; advise Carteret of the legal effect and potential consequences to Carteret of the unauthorized modification to the Contractor's Consent Agreement; or, inform Carteret of its long-term relationship with Algernon Blair.

12. I can state without hesitation that Carteret would not have agreed to the Contractor's Consent Agreement in the form executed if Shushan had informed Cartere of the longstanding professional relationship between him and Algernon Blair; or had I been made aware that Shushan had modified the Contractor's Consent Agreements by adding the guarantee language; or, had Shushan advised me at the May 29, 1985 meeting in New Jersey or in the course of any subsequent communications to Carteret in New Jersey of the said modification and the possible legal effect and consequences to Carteret of that modification.

s/ Steven A. Cole
STEVEN A. COLE

Sworn and subscribed to
before me this 25th
day of April, 1989.
s/ Diane L. Knipper
DIANE L. KNIPPER
NOTARY PUBLIC OF NEW JERSEY
Commission Expires April 29, 1992